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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CLIFFORD F. GURNEY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether, when the consideration exchanged for real and personal property taken *per se* is less than just compensation, the United States is liable to pay the property owners the constitutional shortfall in a Tucker Act proceeding?

II.

Whether the executive branch may finally fix the amount to be paid for property it takes without impermissibly encroaching on the power of the judicial branch to determine just compensation?

III.

Whether the receipt of a substantial benefit less than just compensation for the appropriation of a citizen's property makes that appropriation non-compensable?

IV.

Whether the President's power to espouse and settle claims against a foreign government is an appurtenance of all property acquired in international commerce or located abroad so that an exercise of this power is not a compensable taking?

LIST OF PARTIES

The following persons and entities participated in the case below and are petitioners here:

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Emanuel Aryeh
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Respondent the United States was the only other party in the Court below.

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Philipp Holtzmann USA Inc., a wholly owned subsidiary of Philipp Holtzmann, is the parent corporation of petitioner Lockwood Green International, Inc. Lockwood Green does not have any non-wholly owned subsidiaries. Odsiran Meteorological Systems, Inc. and Odsiran Data Systems, Inc. are both wholly owned subsidiaries of Ocean Data Systems, Inc. Neither has non-wholly owned subsidiaries. Delta Geotechnical Consultants, Inc. has no parent, and no non-wholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (App. 1a) is not yet reported. The opinion of the Court of Federal Claims (App. 18a) is reported at 38 Fed. Cl. 482 (1996).

JURISDICTION

The judgment of the Court of Appeals was entered December 4, 1997. (App. 1a.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

Amendment V of the United States Constitution provides "nor shall private property be taken for public use, without just compensation." The Tucker Act, 28 U.S.C. 1491(a)(1) provides "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . ." The Settlement Agreement for Claims of Less Than $250,000, Case No. 86 and Case No. B38, made between the United States and the Islamic Republic of Iran on May 13, 1990, is reproduced in the Appendix at 30a-40a.

STATEMENT OF THE CASE

Petitioners[1] are United States nationals who owned real and personal property and related claims against the

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[1] Petitioners are individuals, companies, and educational institutions. Their complaint was filed on their own behalf and as representative of all claimants receiving awards from the Foreign Claims Settlement Commission. Their motion for class certification was denied as moot by the Court of Federal Claims.

Government of Iran ("Iran") arising out of the Iranian Revolution. The real and personal property was situated in Iran. The claims against Iran were pending at the Iran-United States Claims Tribunal in the Hague, The Netherlands. In 1990 the President, acting alone, condemned the petitioners' property and conveyed it to Iran "as is and where is." The President also fixed compensation for the property at $50,000,000. The Foreign Claims Settlement Commission determined the value of the property taken to be far in excess of this amount. Petitioners filed suit in the Court of Federal Claims under 28 U.S.C. 1491(a)(1) to secure just compensation under the Fifth Amendment: a "cash award" for the "constitutional shortfall."[2]

* * * * *

The Algiers Declarations ("Declarations"), upheld by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), resolved the "Iranian Hostage Crisis." The Declarations moved adjudication of the claims of U.S. nationals against Iran arising out of the Iranian Revolution from U.S. courts to a new arbitral forum (the Iran-United States Claims Tribunal or "Tribunal") and provided funding for awards in favor of United States claimants. The Declarations also divided claims in two categories, large and small. Large Claims ($250,000 or more) were presented at the Tribunal by each Large Claimant itself. Small Claims, although also referred to the Tribunal, were presented by the United States as "trustee, guardian and representative," on behalf of the Small Claimants.[3]

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[2] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 148 (1974).

[3] *Lord Corporation, a claim of less than $250,000 presented by the United States of America v. Iran Helicopter Support and Renewal Company*, 18 Iran-U.S. Cl. Trib. Rep. 377, 384 n.3 (1988). The United

(continued...)

The Small Claims at the Tribunal

The Tribunal commenced proceedings in 1983 on some 2,800 Small Claims filed with it. At the Tribunal, prevailing Small Claimants[4] collected payment in full including interest on awards to the date of payment. Iran has replenished the security account for the payment of Tribunal awards several times so that every Tribunal award against Iran has been paid in full including interest to the time of payment.

The Settlement Agreement

In May 1990, without specific notice to or consent of the Small Claimants, the United States entered into the Settlement Agreement (App. 30a) expressly appropriating all Small Claims by means of espousal.[5] It then conveyed the claims to Iran. In addition, the United States conveyed to Iran all property, real or intangible, that was the subject matter of a

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[3](...continued)
States considered the relationship between the Small Claimants and the government to be, "if anything, one of greater trust than that of private clients to their attorney." *Dames & Moore v. Department of Treasury*, 544 F. Supp. 94, 99 (C.D. Cal. 1982) (quoting declaration of James H. Michel, Deputy Legal Advisor of the Department of State).

[4] Of the 32 reported small claims decisions, 19 (59% of those decided) were adjudicated in favor of U.S. claimants. Seventy-one Small Claimants received awards on agreed terms. Thus, of the Small Claims resolved at the Tribunal by decision or Tribunal approved settlement, 87% received an award. The comparable statistic for Large Claimants is 74%. (App. 46a, 47a. Johnson Aff.).

[5] "Espousal" is the formal taking up of a citizen's claim against a foreign sovereign, *see* Restatement (Second) of Foreign Relations Law § 211 comment (a) (1965), and vests title to the claim in the United States. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459 (1899); 8 M. Whiteman, Digest of International Law 1216-33 (1967).

Small Claim or related to it even if the Claim had been withdrawn, dismissed on jurisdictional grounds, was never filed, or even if the claimant still owned the property in question.[6] The Settlement Agreement also resolved two outstanding claims of the United States arising from defaulted loans to Iran. In exchange for claims' dismissals and termination and related property transfers Iran agreed to pay the United States the sum of $105,000,000.

Under the terms of the Settlement Agreement, the allocation of the $105,000,000 between the three categories of claims (Small Claims, No. 86, and B38) was "within the sole competence and responsibility of the Government of the United States." (App. 34a (Settlement Agreement § III (iii)).) The government allocated $50 million for payment of the Small Claims and the remaining $55 million for payment of two other claims, which were claims of the United States itself arising from loans it had made to Iran. The United States thus satisfied its own claims to the detriment of the Small Claimants.

The Commission's Computation of Awards

The Small Claims were referred to the Foreign Claims Settlement Commission ("Commission") for valuation. The Commission was directed to decide each claim applying Tribunal precedent, taking into account defenses available to Iran. (App. 34a (Settlement Agreement § III (v)).) It made awards on only about one third of the Small Claims,

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[6] This happened in cases where the claimant alleged an expropriation by Iran but failed to show it and thus remained the owner of the property in question up to the date of the Settlement Agreement. *See, e.g.*, App. 90a (*Matter of Fardanesh*); App. 60a (*Matter of Zargar*); App. 76a (*Matter of Azarmi*).

considerably less than the two-thirds or better success rate of claimants at the Tribunal.

Where the property taken was a claim against Iran, the Commission included in its award interest accruing from the time the claim arose to June 22, 1990, the date the claim was taken by the Agreement. In cases where the United States took property *related* to a claim (real or personal property still owned by a Small Claimant because the expropriation by Iran was not established as alleged), the Commission awarded no interest because no interest had accrued before June 22, 1990.[7]

Small Claimants whose choses in action were taken did not receive what the Commission found due, however. The United States paid these petitioners less than the Commission awarded because the $50,000,000 set by the President to pay the claims was insufficient.[8] Secondly, the United States neither computed nor paid *any* interest for the period after the

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[7] The reasoning was that the claimant continued to own the property up to the date of the Settlement Agreement, when it was taken, and interest was not due, therefore, for this period. *See* App. 91a (*Matter of Fardanesh*). Such prevailing Small Claimants received the full amount of what the Commission awarded but no interest for the period from the Settlement Agreement to the payment, almost five years.

[8] Petitioners here were awarded *in toto* principal of $3,335.945.41 and interest up to June 22, 1990 of $2,801,408.28. Only $1,046,971.12 of this interest found due was paid, leaving a shortfall of $1,754,437.16. or approximately 29% of the total awarded by the Commission. The comparable statistics for the claimants as a whole are principal of $41,570,936.31, interest through June 22, 1990 of $44,984,859.31, with a shortfall of $29,457,290.66.

No Petitioner received interest for any period *after* June 22, 1990. To the initial underpayment, then, must be added (a) approximately four years of interest on the entire award, as it came after the taking and (b) an additional three years of interest on the underpayment.

Settlement Agreement to the date of payment, which was almost five years. This cash shortfall affected all successful claimants.

Petitioners then sued in the Court of Federal Claims asserting their real and personal property had been taken *per se* and that the payment received was less than just compensation as defined by this Court. Petitioners sought a partial summary judgment of the United States' liability for the constitutional shortfall between what petitioners received and fair market value of their houses, orchards, claims, bank accounts, and businesses at the time of their appropriation and conveyance by the United States to Iran and interest to the date of payment.

The Decisions Below

The Court of Federal Claims denied petitioners' motion and granted the United States' cross-motion for summary judgment. The court rejected petitioners' contention that their property had been taken *per se*. Applying its interpretation of the analysis announced by this Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the court determined that the espousal and settlement did not amount to a compensable taking because, primarily, some compensation had been made available.

The Court of Appeals for the Federal Circuit recognized that petitioners' property had been taken *per se*, not merely regulated.[9] (App. 8a.) In the court's view, however, this was

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[9] The court refers to the property affected as "claims" against Iran without acknowledging that real property, tangible property, as well as intangibles other than claims, were also taken and conveyed to Iran. *See e.g.*, App. 84a, 90a (*Matter of Fardanesh*: taking of two pieces of real property); App. 63a (*Matter of Zargar*: taking of apartment building and

(continued...)

not enough to find governmental liability. The court concluded that the factors identified by the Court of Federal Claims in its regulatory takings analysis under *Penn Central* were "relevant" in determining if there had been a "compensable taking."[10] (App. 8a.) The court then denied liability finding that because the President has the power to settle claims against a foreign sovereign, "it does not strain *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] beyond its intended purpose" to hold the exercise of that power is not compensable. (App. 13a.)

Secondly, the court denied liability because it found, without any basis in the record, that petitioners were the "particular intended beneficiaries" of the Settlement Agreement within the purview of *National Board of Young Mens Christian Ass'ns v. United States*, 395 U.S. 85, 92 (1969), and that they had "substantially benefitted" from the settlement. (App. 11a.) The court ignored that the benefit received was "demonstrably and measurably inferior"[11] to what they would have received had they been allowed to proceed at the Tribunal where their claims would have been paid in full including interest to the date of payment. *See Exxon Corp. v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 3, 21-22 (1987) (Brower, J., concurring).

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[9](...continued)
surrounding land); App. 76a (*Matter of Azarmi*: taking of right to refund of down payment and right to delay damages from builder).

[10] Ordinarily courts reach "dramatically different results" depending on whether the taking is viewed as "regulatory" or *per se*. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1275 (9th Cir. 1986), *cert denied*, 485 U.S. 940 (1988).

[11] *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 815 (1st Cir. 1981).

The concurrence, agreeing with the "analysis and result" of the majority opinion, found the case to be "significant." In particular, the case provided an opportunity to recognize that "certain '*per se*' takings . . . which involve a property owner being ousted from his property by government action . . . do not automatically result under the fifth amendment in compensation to the ousted property owner." (App. 14a.) The concurrence suggested a "rule of reason analysis" be applied *ad hoc* to determine if "governmental interests in espousal are so weak" as to warrant compensation. Petitioners having made no such showing, the taking was therefore "non-compensable."

The court did not discuss this Court's decisions in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Dames & Moore v. Regan*, relied on by petitioners below.

REASONS FOR GRANTING THE WRIT

When the President, acting alone, appropriates a citizen's property and conveys it to another, may he also finally fix the compensation to be paid for that property thereby foreclosing judicial inquiry as to its actual value? Or must there be a judicial inquiry and hearing allowing the injured citizen to prove the "constitutional shortfall" between the compensation set by the President and the property's actual fair market value at the time of transfer plus interest to the date of payment, *i.e.*, the just compensation this Court has required?[12]

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[12] Interest from the taking date to the time of payment is a part of just compensation. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149 (1974), *Kirby Forest Indus. Inc., v. United States*, 467 U.S. 1, 10 (1984); *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 278 (1988).

These questions "touch fundamentally upon the manner in which our republic is to be governed."[13]

The President may spend the "bargaining chips" of a citizen's property to achieve an international agreement, but the issue of who ultimately pays -- the national or the nation -- presents an intrinsically important question.[14] The decision below is disruptive: if there is no effective damage remedy at law under the Tucker Act, future claimants of necessity will seek district court injunctions on due process grounds directly restraining implementation of agreements by the executive *before* they take effect.[15] Forcing that option upon claimants would have two undesirable effects. First, it would undermine the President's power to negotiate such resolutions as the Agreement's effectiveness would turn on the outcome of such a challenge. Secondly, the reviewing court, if not the Court of

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[13] *Dames & Moore v. Regan*, 453 U.S. 654, 659 (1981).

[14] See Cohen & Ravitch, Economic Sanctions, Domestic Deprivations, and the Just Compensation Clause: Enforcing the Fifth Amendment in the Foreign Affairs Context, 13 Yale J. Int'l L. 146, 162 (1988), urging that the "principle of just compensation for takings abroad" be adopted. ". . . [W]here the United States has either signed a treaty that 'takes' title or allows a foreign state to assume title as a part of the agreement, or has itself acquired use of the contested property, it should be held liable in the Claims Court for its actions."

[15] Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), granting injunctive relief against a governmental seizure in the absence of a Tucker Act remedy with *Dames & Moore v. Regan*, 453 U.S. 654 (1981), denying injunctive relief on grounds the Tucker Act damage remedy was an adequate remedy at law thereby precluding equitable relief. To the same effect compare the district court decision enjoining the "conveyance taking" of rail properties because of the unavailability of a Tucker Act remedy with the Supreme Court's vacation of that injunction, having found the Tucker Act remedy available. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 119-20 (1974).

Federal Claims in a Tucker Act suit, would have to examine the adequacy of compensation in a vacuum, in the rushed atmosphere of a preliminary injunction hearing, and without an appropriately "developed record."[16]

The rule announced below -- that there is no effective Tucker Act remedy for takings by Presidential espousals -- will govern all future executive agreements. And the "sheer magnitude"[17] of the Presidential power asserted makes this case worthy of consideration by this Court. Yet very likely the decision will never conflict with that of another circuit thereby invoking this Court's customary *certiorari* discretion. This is an artifact of the peculiar, exclusive appellate jurisdiction of the Federal Circuit over damage claims against the United States. 28 U.S.C. § 1295(a)(2) & (3). This exclusivity guarantees that all money claims for takings by espousal will come through the Court of Appeals for the Federal Circuit and nowhere else.[18]

Two portions of the opinion stand out for their dissonance with Fifth Amendment jurisprudence. First, the court below erroneously indicated that the appropriation of a citizen's property is not a compensable taking if the appropriation, although complete, nonetheless confers through a compensation mechanism a "substantial" benefit upon the citizen which is less than "just compensation." This view

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[16] *Regional Rail Reorganization Act Cases*, 419 U.S. at 146.

[17] *Dames & Moore*, 453 U.S. at 688 (quoting with approval *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F. 2d 800, 814 (1st Cir. 1981)).

[18] This is not true of most taking claims against the United States which almost invariably involve real property interests located within the United States. District courts have jurisdiction over such proceedings under 28 U.S.C. 1358 with concomitant review in all circuit courts.

misconstrues this Court's decision in *National Board of Young Mens Christian Ass'ns v. United States*, 395 U.S. 85 (1969) (*"YMCA"*), and would convert the Fifth Amendment to read "nor shall private property be taken for public use without *substantial* compensation."

Second, the court erroneously found that the President's right to espouse is an attribute of all property acquired through international commerce or located abroad. The court thus misconstrued *Lucas* by including in the "logically antecedent" analysis of the common law attributes of the property in question *the power of eminent domain itself.*[19] While some "circularity must be tolerated . . ." in takings analysis,[20] the court below surely goes too far, as it would eliminate just compensation for takings altogether.

The holding is also wrong on the merits -- the President is bound by the Bill of Rights "even when acting in the sphere of international relations,"[21] and does not have a right to appropriate private property for public use without just compensation. These issues -- whether if the citizen has realized some benefit the appropriation of his property is not compensable, whether the power of eminent domain itself is a part of background law to be examined when making a *Lucas* determination, and whether the unexercised power of condemnation is an attribute of all property such that its exercise is not compensable -- arise in any number of contexts in the several circuits and in each of the states.

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[19] The power of espousal is a species of the eminent domain power. See pp. 26-27, *infra*.

[20] *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

[21] *Main*, 651 F.2d at 813, n. 20.

The decisions of this Court hold that conveyance takings of property are compensable and that victims of such expropriation must be able to obtain a "cash award" for the "constitutional shortfall" for their injury in a suit under the Tucker Act, precisely the remedy the decisions below made unavailable. Accordingly, the case merits review.

1. The Decision Below is Inconsistent with this Court's Decisions in the *Rail Reorganization Cases* and *Dames & Moore v. Regan*

The taking and conveyance to Iran of petitioners' property here are indistinguishable from the "conveyance taking" in *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).[22] There the Rail Act directed the transfer by the Penn Central (the "debtor") of its railroad property (real and personal) to a government corporation as part of the reorganization of the bankrupt northeast rail operations. The Act also provided compensation consisting of money and securities in new reorganized entities. The debtor objected on grounds that the consideration which Congress provided in exchange for the conveyance of its railroad properties was inadequate. It was clear, however, that Congress in enacting the Rail Act intended that no further compensation be provided to the debtor above what the Act provided. The debtor then sought to enjoin the transfer on grounds that the Rail Act deprived it of its property without due process of law.

When this Court was considering the challenge to the Rail Act, no court had yet passed on the constitutional adequacy of the congressionally fixed compensation. The availability of review under the Tucker Act, where that issue

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[22] The court below did not discuss or refer to this case although it was relied on by petitioners.

could be resolved, saved the scheme from immediate constitutional scrutiny:

> Congress fully expected that this consideration would provide the minimum compensation required by the Constitution; it wished to provide no more. If, however, that hopeful expectation should not be fulfilled, and the consideration exchanged for the rail property should prove to be less than the constitutional minimum, the Tucker Act will be available as the jurisdictional basis for a suit in the Court of Claims for *a cash award to cover any constitutional shortfall. Id.* at 148 (emphasis added).

This Court applied these principles in *Dames & Moore v. Regan* to the President's power to settle claims against foreign nations. In deciding that the Tucker Act was available as a remedy for any unconstitutional taking, this Court necessarily found that the interests there at issue -- claims against Iran -- were property capable of being taken in violation of the Fifth Amendment. Otherwise, this Court would not have been required to decide the availability of the Tucker Act remedy: it could simply have stated no such remedy need be available because claims against a foreign government and tangible property abroad, are not property, or that the United States has an inherent right to appropriate these claims without compensation.

Dames & Moore is this Court's most recent discussion of the relation of the takings clause and the foreign relations power. But the Presidential action considered there was fundamentally different from the action taken here. In *Dames & Moore*, the President had shifted the venue of claims'

adjudication to the Tribunal; there was no appropriation and transfer of claims or real property of U.S. citizens as here. Nevertheless, a taking of property without just compensation was threatened by the operation of the Algiers Declarations and this made "ripe for adjudication the question whether petitioner will have a remedy at law under the Tucker Act..." 453 U.S. at 689.

There were several bases argued for contending that claims might be "taken" by the Declarations without provision for just compensation. First, there was no assurance that Iran would replenish the escrow account once it was depleted by awards. Thus, there was a distinct possibility that claimants would go to the Tribunal but return with less than just compensation or no compensation at all. Second, not all claimants referred to the Tribunal were eligible to have their claims heard there. Certain contract claims were excluded from the jurisdiction of the Tribunal by Article II, Section 1 of the Claims Settlement Declaration. Nevertheless, the Declarations "terminated" these claims and excluded them from the jurisdiction of the courts of any nation.[23] Such claimants would have had their claims terminated, yet not be within the Tribunal's jurisdiction -- a "Catch-22" leaving them with no remedy.

Dames & Moore was in this situation. (Transcript of Oral Argument, Petitioner's counsel at 6.) Accordingly, it urged that the Tucker Act damage remedy must be available to it under *Regional Rail Reorganization Act Cases* should their

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[23] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981, art. VII(2), 20 I.L.M. 223 (1981).

claim go to the Tribunal only to be dismissed on jurisdictional grounds. As Mr. Justice Rehnquist inquired of the Solicitor General, ". . . what if they go through all these steps and come back and can show a loss, then do they have a takings claim?" (Tr. Oral argument, 41). As the provisions of 28 U.S.C. § 1502 exclude claims "arising under or dependent on a treaty" from the jurisdiction of the Court of Federal Claims that forum seemed *un*available for a Tucker Act claim. This dilemma was eased by the Solicitor General's concession at oral argument that §1502 did *not* bar the Tucker Act remedy. This Court added "We agree." *Id.* at 689.

At no point did this Court suggest that Dames & Moore's claim was anything but property subject to the protection of the Fifth Amendment and capable of being taken by the United States.[24] Nor was it suggested that the President had an "easement" of some kind allowing him to take complete possession of its claim without compensation. Had such been the case, much of this Court's opinion would have been unnecessary.

The impact of the Settlement Agreement is far more direct than the potential effect of the Declarations on Dames & Moore's claims. Here petitioners' property was *appropriated* and *conveyed* to Iran.

2. The President's Determination of "Just Compensation" Usurps a Purely Judicial Function

This Court considered in *Monangahela Nav. Co. v. United States*, 148 U.S. 312 (1893), legislation fixing the

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[24] This seems to be the thrust of the opinion below when it suggests that the right to compensation is not in petitioners' "bundle of sticks" because the property involved is not located in the United States.

compensation to be paid for property condemned, locks and a dam on the Monangahela River, at a sum not to exceed $161,733.13. The law also stated that in proceedings to value the property, "the franchise of said corporation to collect tolls shall not be considered." In holding that the Congressionally imposed dollar limit could not be given effect, this Court stated

> By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation . . . *But when the taking has been ordered, then the question of compensation is judicial.* It does not rest with . . . the legislature . . . to say what compensation shall be paid, or even what shall be the rule of compensation." 148 U.S. at 327 (emphasis added).

An unbroken line of this Court's decisions has maintained the vitality of this proscription. *United States v. New River Collieries, Co.*, 262 U.S. 341 (1923), reiterated ". . . ascertainment of compensation is a judicial function, and no power exists in any department of the government to declare what compensation shall be or to prescribe any binding rule in that regard." *Id.* at 343-44. More recently, in 1980, this Court reaffirmed ". . . the ancient principle that the determination of the measure of just compensation for a taking of private property 'is a judicial and not a legislative question.'" *United States v. Sioux Nation of Indians*, 448 U.S. 371, 417 n. 30 (1980).

What the Congress acting together with the President is forbidden to do cannot be accomplished by the President acting on his own authority. Yet that is the result of the decision below. The President has taken property and assumed to himself the wholly "judicial function" of determining the

amount of "just compensation." In finding that the President had provided an adequate alternative to either continued enjoyment of the property or just compensation, the Federal Circuit endorsed this procedure. This stands in contradiction to *Monangahela* and its progeny.

The encroachment by the President on the function of another coequal department, the judicial branch, is neither minor nor inconsequential. It is thorough and complete: there is essentially no role for the judiciary under the decision below, no matter what compensation is set. Under the analysis of *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) this is an "aggrandizement" of Presidential power "at the expense of a coordinate branch."

Permitting the judiciary to exercise its exclusive power to determine just compensation will not inhibit the President's exercise of his foreign affairs power. Judicial review will only mean that the public, not individuals, bear the costs of our foreign policy goals. In fact President Carter was specifically advised by his counsel *before* entering the Algiers Declarations that *Rail Reorganization Act Cases* required a constitutionally adequate compensation for the claimants who were diverted from U.S. district courts to the Tribunal. *See* App. 41a-45a (Testimony of Lloyd Cutler, Esq. in *Halliburton Corp. v. Commissioner*, No. 9797-86 (U.S. Tax Ct.)).

This Court should grant *certiorari* and clarify, for benefit of the court below and the President, that determinations of just compensation for a taking by the United

States are judicial functions, notwithstanding the fact that the appropriation is undertaken to advance foreign policy goals.[25]

3. The Decision Below Impermissibly Broadens this Court's Decision in *YMCA*

This Court should grant *certiorari* in order to clarify that the decision in *YMCA* was limited to emergencies where immediate government action was necessary to protect substantial private interests, and to clarify to the Federal Circuit and all other courts that receipt of some benefit less than just compensation does not, of itself, convert an otherwise compensable taking into a permitted encroachment.

The court below reasoned that because petitioners received a "substantial" benefit from the espousal and settlement, there had been no compensable taking. Not only does this confuse the distinct taking and compensation analyses, it is a serious misapplication of the authority relied upon below -- this Court's holding in *YMCA*.

YMCA arose from a civil disturbance in the Panama Canal Zone. *YMCA*, 395 U.S. at 86. In the course of the disturbance, a building owned by the YMCA was damaged. The YMCA sued, claiming that its building was damaged as the direct result of the U.S. Army's having taken up positions first in front of the building, and later inside the building. The Court rejected this claim, finding that the damage to the building was caused by the rioters, and not by the United States. *Id.* at 89. In addition, however, the Court considered whether the United States was liable under the Fifth

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[25] The exercise of this judicial function is all the more important where, as here, the taking occurs in peacetime and in the absence of an international emergency or other overarching foreign policy concern.

Amendment for the Army's temporary occupation of the building. The Court found that it was not, for two reasons: first, the YMCA had abandoned the building during the disturbance, and therefore was not deprived of its use by the Army's occupation. *Id.* at 89-90. Second, the Court found that the YMCA had stipulated that the Army had occupied the building for the primary purpose of protecting the building. The Court indicated that

> where, as here, the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity may also "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside. *Id.* at 92 (citations omitted).

This rule has been applied sparingly in the ensuing 30 years, perhaps because it has been consistently understood to stand for a proposition that does not often arise: that when the government occupies property to protect it, no compensable taking has occurred. *See Penn Central*, 438 U.S. at 128 (1978); *Hohri v. United States*, 782 F.2d 227, 243 n.36 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Indeed, reported applications of the *YMCA* rule have involved the situation hypothesized in *YMCA*: damage to private property due to law enforcement activity. *See, e.g., Brannan v. City of Tulsa*, 932 P.2d 44 (Okla. Ct. App. 1996); *Wallace v. City of Atlantic City*, 608 A.2d 480, 482-83 (N.J. Super. Law 1992).

The Federal Circuit cited *YMCA* but did not apply its holding.[26] The court did not base its decision on the motives of the United States. Nor was there any indication that the court considered that the President acted from necessity. Indeed, there was no record evidence as to what moved the President to espouse and settle the small claims: the United States did not present any factual basis whatever for a conclusion that the espousal and settlement was motivated to benefit the petitioners in particular.[27]

By changing the inquiry from the government's need to act in an emergency to the hypothesized beneficial effects of the government's actions, the Federal Circuit's decision in this case stretches *YMCA* beyond recognition -- and, if the new interpretation is followed in other courts, will have a profound impact on takings jurisprudence. The *YMCA* rule, unambiguously based on the government's duty to act in an emergency for the benefit of particular citizens, is replaced with a rule which amounts to a complete fusion of the "taking" and "compensation" parts of the inquiry. Under the Federal Circuit's holding, a state would be free, for example, to

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[26] The court below also ignored this Court's discussion of *YMCA* in *Loretto v. Teleprompter Manhattan Teleprompter CATV Corp.*: where this Court distinguished physical invasion cases, such as *YMCA*, from permanent occupation cases, such as *Loretto*: 458 U.S. 419, 432 (1982). Here it is beyond dispute that petitioners property was permanently espoused -- that the government's action cannot be considered a "physical invasion short of permanent appropriation."

[27] The undisputed facts showed that before espousal, petitioners had the right, under Tribunal precedent, to be paid interest on their claims from the date of the taking by Iran through the date of payment. It is also undisputed that after the espousal and settlement, petitioners received substantially less interest than they would have if their claims had been decided at the Tribunal. Thus whatever "benefit" petitioners received was less than what was taken from them.

appropriate farmland to build a highway without compensation, provided it could show that the highway would allow the farmer better access to markets. A municipal body would be free to restrict all use of a landowner's real property and provide as compensation transferable development rights worth half the value lost to the real property. This interpretation "render[s] much of [the Court's] regulatory takings jurisprudence a nullity,", when applied to a *per se* taking. *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1672 (1997) (Scalia, J. concurring) Taken to its logical conclusion -- in fact, as applied here -- the Federal Circuit's new rule is that the Constitution merely requires "substantial" compensation, not "just" compensation. Neither the language of the Fifth Amendment, nor any precedent of this Court, supports this interpretation.

4. The Court of Appeals' Inclusion of the Power of Eminent Domain in the "Logically Antecedent Analysis" Required by *Lucas*, Nullifies that Decision

In *Lucas*, this Court considered whether state restrictions on beachfront development constituted a taking under the Fifth and Fourteenth Amendments. The Court concluded that the property lost all economic value as a result of the restrictions, but could not determine whether a compensable taking had occurred. The Court held that a taking would not have occurred if the state had the power, under the common law, to impose the same restrictions without making just compensation:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the prescribed use

> interests were not part of his title to begin with. *Lucas*, 505 U.S. at 1027.

The Federal Circuit has misapplied the Court's decision in *Lucas* to this case in two independent ways. First, the court below incorrectly conducted the "logically antecedent inquiry" by including the eminent domain power (espousal) as part of the "estate" that petitioners had in their overseas property. If this approach were correct there could *never* be a taking since all property (domestic and foreign) is subject to being condemned for the public good. Second, the court erroneously held that "the prescribed use interests" -- in this case continued possession of any interest in the seized property -- was not part of petitioners' "title to begin with." Taken together, these interpretations are remarkable distortions of *Lucas*, and, have obvious, far-reaching consequences. The court below would grant the President "plenary power to settle claims, even as against foreign governmental entities," the very power this Court refused to sanction in *Dames & Moore*. *Dames & Moore*, 453 U.S. at 688.

Since *Lucas*, courts have understood that the "logically antecedent inquiry" requires analysis of the property under the law that creates that property. *See, e.g., Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996), *cert denied*, 118 S. Ct. 441 (1997); *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701 & n.5 (D.C. Cir. 1994) (noting that while federal definition of property was applicable in determining propriety of administrative action, state definition would be applicable to takings claim); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 453-57 (Or. 1993), *cert denied*, 510 U.S. 1207 (1994) (regulation preventing enclosure of beach property where Oregon law recognized public right of access). This is because, as the Court noted,

> [a]ny limitation so severe cannot be merely legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts . . . *Lucas*, 505 U.S. at 1029.

Neither the Federal Circuit nor the government has identified a court with the power to transfer complete ownership of petitioners' property without compensation. While there has been some confusion as to whether the "common law" to be applied in this inquiry includes statutes, *see, e.g., Kim v. City of New York*, 681 N.E.2d 312, 315 (N.Y.), *cert denied*, 118 S. Ct. 50 (1997) (analyzing divergent views), as well as whether this inquiry is truly "antecedent," or whether it folds into the "reasonable investment-backed expectations" prong of a *Penn Central* analysis, *see, e.g., Colorado Dept. of Health v. The Mill*, 887 P.2d 993, 1002-03 (Colo. 1994), *cert denied*, 515 U.S. 1159 (1995), there has never been a suggestion that a court should *not* look at the law of the state or nation where the property exists.

Here petitioners' rights derived from a variety of different laws.[28] Petitioner Gurney, for example, had a right

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[28] This case raises the subsidiary question whether the Just Compensation clause applies to property located abroad, an issue this Court has not finally resolved, although it has implied and the lower courts have found that the Fifth Amendment obligation of just compensation applies to the taking by the United States of property owned by a citizen but located outside the United States. *United States v. Belmont*, 301 U.S. 324, 332

(continued...)

under Iranian employment law to receive a termination payment after his twelve-year job at the Iranian embassy in Washington, D.C. ended. (App. 51a-52a.) Petitioner University of Northern Colorado had a contractual right to be paid tuition (App. 80a-82a), under Colorado law. Petitioners Zargar and Samimy owned real property in Iran. (App. 55a-56a.) Under the holding of *Lucas*, as it has been almost universally applied, the Federal Circuit was required to determine that the President's right to take their property without compensation was an attribute of Iranian contract law, Colorado contract law, and Iranian property law, respectively. The government did not assert, and the Federal Circuit did not determine, that the President's rights arise under the law underlying the claimants' property. Instead, the circuit found that the president's foreign policy power to espouse claims -- a Presidential power asserted and acquiesced in by Congress,

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[28](...continued)
(1937) (dicta); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (dicta); *Porter v. United States*, 496 F.2d 583, 591, 204 Ct. Cl. 355 (1974), *cert. denied*, 420 U.S. 1004 (1975); *Seery v. United States*, 127 F. Supp. 601, 603, 130 Ct. Cl. 481 (1955); *Turney v. United States*, 115 F. Supp. 457, 464, 126 Cl. Ct. 202 (1953); *see Reid v. Covert*, 354 U.S. 1, 9 (1957) (citing *Mitchell* and *Turney* with approval). That the extraterritoriality of the property is not of paramount consideration can also be implied from this Court's decisions in *YMCA, United States v. Caltex*, 344 U.S. 149 (1952), *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), and *Ribas y Hijo v. United States*, 194 U.S. 315 (1904). In each case, the claimant's property was taken outside the United States -- and in each, the Court denied compensation on a basis other than the simple and undisputed fact that the property was located outside the United States. More recently, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court distinguished the applicability of the Fourth Amendment -- which is not available to foreign citizens on foreign soil -- with that of the more broadly phrased Fifth Amendment. *Id.* at 264-66. The Federal Circuit did not address this question although an unavoidable implication of its holding here is that the Just Compensation clause does not apply to property located abroad whether acquired by will, gift or investment.

see Dames & Moore, 453 U.S. at 688 -- satisfied the requirements of *Lucas*.

By including in the applicable common law to be examined the power to condemn or espouse, the Federal Circuit has critically undermined *Lucas*. The analysis assures there can never be a taking because in every case of property ownership there will always be the possibility of condemnation which, under the analysis below, renders the taking a "non-compensable taking."

As for the second error -- whether a right to continued possession of any interest inhered in petitioners' title to their property, the Federal Circuit did not cite to *any* decision from this Court which even remotely supports the proposition that the President has the power to appropriate a citizens property free of any obligation of compensation. Nor could it.[29]

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[29] *See Gray v. United States*, 21 Ct. Cl. 340, 392-93 (1886), holding that a claims settlement by the United States was a taking. Petitioners did not argue below, and are not asserting here, that *Gray* is binding in this case. However, *Gray* is either a correct statement of the law or it is not. If it is not a correct statement of the law, then either (a) it was incorrect when made or (b) the principles articulated in *Gray* have somehow changed. That the former is not the case is indicated by Congress' payment of claims. Indeed, the court below distinguished *Gray*, determining that Fifth Amendment jurisprudence had "evolved" over the last 100 years. It did not, however, point to any cases in which the principles enunciated in *Gray* have been abandoned or modified by this Court.

The few times the Court has had similar questions before it, it has declined to interpret the Fifth Amendment contrary to *Gray*. As noted above, in *Dames & Moore*, the Court considered whether the transfer of claims was a taking. If the court below is correct that under an evolved Fifth Amendment, claims against a foreign sovereign may be taken without just compensation, the Court could have summarily answered this question in the negative. In *United States v. Sperry Corp.*, 493 U.S. 52 (1989), the Court

(continued...)

"[N]either the President nor Congress may exercise their powers so as to contravene the protections of the Bill of Rights, even when acting in the sphere of international relations." *Main*, 651 F.2d at 813, n. 20. The President's power to espouse claims is not merely an analogue to the power of eminent domain -- it is the same power and has the same purpose:

> The right of sovereigns to dispose of the effects of individuals in order to make peace, is often a disputed point, nor can they exercise this right over the property of subjects in any manner other than as sovereigns. The property of subjects is so far under the eminent control of the State, that the State or the sovereign who represents it, can use that property, or destroy it, or alienate it, not only in the case of extreme necessity, which sometimes allow individuals the liberty of infringing upon the property of others, but on all occasions, where the public good is concerned, to which the original framers of society intended that private interests should give way. But when that is the case, it is to be observed, the State is bound to repair the losses of individuals, at the public expense, in

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[29](...continued)
considered whether the imposition of a fee on Tribunal awards was a compensable taking. The Court concluded that it was not, and specifically distinguished *Gray*, noting that the United States had not canceled altogether Sperry's claims. *Id.* at 59 n.6. In *Sperry*, the Court also explicitly noted that Sperry was not asserting the claim advanced by petitioners here -- that the government's action had led to a gross recovery less than would have otherwise been obtained. *Id.* at 59-60. Again, petitioners are not contending that the Court has adopted the rule in *Gray* -- it is clear, however, that this Court has not subscribed to an evolution of the Fifth Amendment that overrules *Gray*.

> aid of which the sufferers have contributed their due portion. 1 Nichols on Eminent Domain § 1.2[2] (quoting Grotius, *De Jure Belli et Pacis*, Lib. III, C.20, Sec. 7 (1625)).[30]

Yet the court below did not simply conclude that the President has the power to take property without compensation.[31] It found -- without citation to any authority whatsoever -- that the potential exercise of the power is an incorporeal hereditament burdening any and all property acquired through international commerce.[32] The decision of the Federal Circuit is striking in one more respect: not only did the court hold that the President has the power to appropriate

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[30] *See also Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 283 (1796) (Opinion of Cushing, J.) (reinstatement of previously canceled debts to foreign subjects could be considered proper exercise of eminent domain). The relationship between the power to espouse and the obligation to compensate was recognized in that case as well:

> [t]hat Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but . . . ample compensation ought to be made to all . . . who have been injured by the treaty for the benefit of the public. This principle is recognized by the constitution . . . *Id.* at 245 (Opinion of Chase, J.).

[31] In any event, even if he possessed this power, the potential that this power might be exercised had not ripened into a property right at the time petitioners acquired their property. It was -- at very most -- a mere "unilateral claim of entitlement," *Nollan v. California Coastal Comm.*, 483 U.S. 825, 833 n.2 (1987), not an enforceable property interest.

[32] Petitioners University of Northern Colorado and Gurney, for example, acquired their rights against Iran as the result of transactions with Iran conducted in the United States. *See* App. 80a-82a (*Matter of University of Northern Colorado*); App. 49a-50a (*Matter of Gurney*).

without just compensation, it found that this proposition is such a common place that each and every petitioner can be charged with knowledge of it, without any evidentiary showing at all, despite the explicit, contrary language of the 1955 Treaty of Amity between the United States and Iran.[33] This is exactly the kind of abuse the Court sought to prevent when it explained that only rules derived from an "*objectively reasonable application*" of pre-existing law can be said to inhere in a property owner's title. *Lucas*, 505 U.S. at 1032 n.18.

The lower court's extraordinary holding has implications far beyond this case. First, there is the question of what is the proper source for determining whether, under *Lucas*, a sovereign's right to appropriate or condemn property is to be considered in the "logically antecedent" analysis under *Lucas*. Second, does the President have the power to appropriate private property without just compensation, simply because the property was acquired in international commerce.

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[33]The Treaty of Amity provided that

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting party, in no case less than that provided for by international law. Such property shall not be taken without the prompt payment of just compensation. 8 U.S.T. 899, T.I.A.S. No. 3853. art. IV(2).

Petitioners were therefore operating in a fundamentally different environment from the plaintiffs in *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992), cited by the concurrence below. App. 15a. Those plaintiffs were involved in banking, "'one of the longest regulated and most closely supervised of public callings,'" *id.* at 958 (*quoting Fahey v. Mallonee*, 332 U.S. 245, 250 (1947), and could therefore not claim a taking when the government exercised its regulatory authority to place their savings and loan association in receivership.

Finally, is this Presidential power an incorporeal hereditament -- a present property interest -- of all property?

The Court should grant *certiorari* to resolve these questions.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

Respectfully submitted,

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Dated: March 3, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-5011

WALTER ABRAHIM-YOURI, EMANUEL ARYEH, OURIEL ARYEH, MEHRDAD AZARMI, JALIL FARDANESH, DELTA GEOTECHNICAL CONSULTANTS, CLIFFORD F. GURNEY, DAVID LAYLIN, ODSIRAN METEOROLOGICAL SYSTEMS, INC., ROBERT L. RUTZ, JEAN BIJAN SAMIMY, M.D., CAROLYN D. SPATTA, UNIVERSITY OF NORTHERN COLORADO, RICHARD C. WILLSON, JR., DARA ZARGAR, LOCKWOOD GREEN INTERNATIONAL, INC., NOURIEL ARYEH, SAMUEL ARYEH, BAHMAN MAALIZADEH, ODSIRAN DATA SYSTEMS, INC., LINA Z. SAMIMY, M.D. and UNIVERSITY OF PITTSBURGH,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

December 4, 1997, Decided

PLAGER, Circuit Judge.

Plaintiffs-Appellants ("plaintiffs") appeal from a Court of Federal Claims decision, *Abrahim-Youri v. United States*, 36 Fed. Cl. 482 (1996), granting summary judgment to the United States. Plaintiffs filed suit for "just compensation" for an

alleged taking[1] of property that occurred when the United States ("Government") espoused[2] and settled their claims against the government of Iran. Because no compensable taking occurred, we affirm the Court of Federal Claims' decision.

BACKGROUND

On November 4, 1979, the American Embassy in Tehran, Iran was seized and American personnel were taken hostage. In response, President Carter signed Executive Orders blocking transfers of property of Iran, which had the effect of "freezing" billions of dollars of American-controlled Iranian assets.

The "hostage crisis" resulted subsequently in a wide variety of claims of U.S. nationals against Iran. On January 19, 1981, the United States and Iran entered into a series of agreements, including two declarations of the government of Algeria, the "General Declaration"[3] and the "Claims Settlement Declaration,"[4] negotiated as part of the ultimate resolution of

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[1] "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

[2] "A claim is espoused by the United States ... when the government of the United States, usually through diplomatic channels, makes it the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the injury." Restatement (Second) of Foreign Relations Law of the United States § 211 cmt. b (1965).

[3] Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 223.

[4] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the

(continued...)

the hostage crisis. The agreements, known as the "Algiers Accords," provided for the release of the hostages, the return of assets to Iran, the termination of certain litigation against Iran in U.S. courts, and the establishment of the Iran-United States Claims Tribunal ("Tribunal") to resolve certain outstanding claims. The Algiers Accords, and the series of Executive Orders that implemented them, were challenged and subsequently upheld by the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981). *See generally* Shlomo Cohen *et al.*, Notes, The Iranian Hostage Agreement Under International and United States Law, 81 Colum. L. Rev. 822 (1981).

Article II(1) of the Claims Settlement Declaration gave the Tribunal jurisdiction to hear all claims against either country brought by nationals of the other, arising "out of debts, contracts ..., expropriations or other measures affecting property rights," as well as certain government-to-government disputes. Claims of U.S. nationals of less than $250,000 ("small claims") were to be presented to the Tribunal by the United States Government. To ensure payment of Tribunal awards in favor of U.S. nationals, the General Declaration provided for an interest-bearing security account, initially funded with one billion dollars of Iranian assets, and thereafter to be maintained, through deposits by Iran, at a minimum balance of $500 million.

Over the next several years, the United States and Iran continued negotiations in an effort to resolve the small claims of U.S. nationals and certain claims of the United States. In

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[4](...continued)
Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 20 I.L.M. 223, 230.

1985, Congress passed legislation giving the Foreign Claims Settlement Commission ("Commission") standby jurisdiction to adjudicate claims of U.S. nationals against Iran in the event that the two governments concluded a lump-sum settlement of claims.[5] As of August 1989, only 82 small claims had been decided, while over 2,200 small claims remained pending before the Tribunal.

On May 13, 1990, the United States and Iran reached an agreement to settle the small claims of the U.S. nationals, along with a separate claim of the United States, for a total of $105 million.[6] Claims of U.S. nationals involving $250,000 or more were unaffected by this agreement and remained pending at the Tribunal. In return for the payment of $105 million, the Settlement Agreement provided for espousal of the small claims by the United States, extinguishment of the small claims and the United States claim against Iran, transfer to Iran (by quitclaim) of all property interests underlying the small claims, and referral of the small claims to the Commission for final evaluation and determination of amount. On June 22, 1990, the Settlement Agreement became effective when the Tribunal accepted the agreement and issued an award on agreed terms. The State Department then transferred all of the small claims to the Commission for adjudication. The Government allocated $55 million of the settlement amount for its own claim, and $50 million for payment of the small claims referred to the Commission.

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[5] Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, Title V, 99 Stat. 405, 437 (1985) (codified at 50 U.S.C. § 1701 note (1994) ("Iran Claims Settlement")).

[6] Settlement Agreement in Claims of Less than $250,000, Case No. 86 and Case No. B38 ("Settlement Agreement").

Appendix A

The Commission concluded its adjudication of the small claims by February 1995. The proceedings held before the Commission were ex parte; Iran was not a party to the proceedings, but did provide numerous documents to the Commission. A total of 3,066 claims[7] were resolved, and 1,000 of the claims were upheld. The successful claimants received awards plus interest, measured from the date of Iran's wrongful act until June 22, 1990, the effective date of the Settlement Agreement. Interest was not awarded for the period after June 22, 1990. In all, the Commission entered awards with an aggregate total value of $41,570,936 in principal and $44,984,859 in interest. Consequently, the $50 million allocated for the small claims (together with the interest borne on that sum) was insufficient to pay the successful claimants the full amount of their interest awards. Each claimant received the full amount of the principal awarded by the Commission and approximately 34.5 percent of the interest computed by the Commission.

Plaintiffs' claims were among those upheld by the Commission. After the United States and Iran entered into the Settlement Agreement, plaintiffs filed suit in the Court of Federal Claims, taking the position that the action of the United States in espousing and settling their claims was a taking for which the Fifth Amendment requires just compensation. They seek the payment of interest on the judgment awarded by the Commission, both the balance of the amount computed by the

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[7] The Settlement Agreement included a number of claims that had not been pending before the Tribunal, such as those that had been filed with the State Department but not filed with the Tribunal due to an expired filing deadline. *Abrahim-Youri*, 36 Fed. Cl. at 484 n.7.

Commission and interest beyond the interest cutoff date of June 22, 1990.

The trial court evaluated plaintiffs' takings claims under the three-factor test enunciated by the Supreme Court in *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). With regard to the investment-backed expectations factor, the court noted that "those who engage in international commerce do so in full awareness that the security of their enterprise is uniquely dependent on the maintenance of stability and good order in the relationships of the nations involved....[;] the potential for Government involvement in international commerce remains an ever-present fact of life for those who transact their business abroad." *Abrahim-Youri*, 36 Fed. Cl. at 486. The court charged plaintiffs with knowledge of this reality.

The court went on to consider the other two factors as well. The character of the Government's action -- the espousal -- was deemed to be consistent with the conduct of foreign relations by the President and with the circumstances of the case. *Id.* at 486-87. The third factor, the economic impact, was seen as resulting from the actions of Iran, rather than the United States, and the failure to obtain the full amount of the interest was not an extraordinary or unusual loss requiring governmental recompense. *Id.* at 487.

In light of this analysis, the trial court concluded that no compensable taking occurred and granted summary judgment to the United States. *Id.* at 487-88. This appeal followed.

Appendix A

DISCUSSION

On appeal, plaintiffs argue that the trial court's view of the case under its Penn Central analysis is flawed in several respects, but more to the point, argues plaintiffs, the Penn Central type analysis is wholly inapplicable. This, according to plaintiffs, is because the Government effected a "*per se*" taking of their property (i.e., their causes of action against Iran) by espousing and settling their claims, which were pending before the Tribunal, and the Court of Federal Claims therefore erred in applying the three-factor Penn Central analysis which applies to regulatory takings, not to "*per se*" takings.

Seen as a "*per se*" taking, that is, one in which the plaintiffs' property was actually seized and became the property of the Government, the outcome, according to plaintiffs, is dictated by a straightforward syllogism: "since the existence of the property, the government action effectuating the taking, and the underpayment were all uncontroverted, summary judgment should have been granted to plaintiffs on the liability issue."

It is true that there are important analytical differences that must be respected between a claim for a taking based on a regulatory imposition that constrains an owner's continuing use of property, and one that is based on an outright governmental seizure or occupation of private property. The former is referred to as a "regulatory" taking; the latter as a "physical" (sometimes "*per se*") taking. The Supreme Court has made it clear that these two different fact patterns call for two different analytical approaches. *Compare Penn Central*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646, with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). *See Hendler v. United States*, 952 F.2d

1364, 1371-74 (Fed. Cir. 1991) (discussing the differences in fact patterns and analyses).

We agree with plaintiffs that their property rights -- their choses in action against Iran -- were extinguished when the Government espoused and settled their claims. After the espousal by the United States, the choses in action were not simply regulated in some manner, but were terminated; plaintiffs no longer had claims against Iran, but instead had a claim against the fund to be allocated by the Commission. In that sense plaintiffs are correct that this fact pattern does not fit comfortably in the regulatory taking category, the category to which the Penn Central analysis traditionally applies.

To say that, however, does not say that plaintiffs' syllogism necessarily follows, or that the considerations identified by the trial court are not relevant to the proper outcome in the case.[8] Since the reemergence of Fifth Amendment takings law from its long Twentieth-century slumber, see *Hendler*, 952 F.2d at 1371-74, takings claims have come in a variety of forms arising from a variety of fact patterns, some of which fit less than comfortably into the regulatory or physical takings dichotomy. *See, e.g., Board of County Supervisors v. United States*, 48 F.3d 520 (Fed. Cir. 1995) (claiming inter alia, a taking of a developer's "proffers"); *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 75 F.3d 648 (Fed. Cir. 1996) (claiming, inter alia, that public's assertion of its alleged rights by the Government constituted a taking); *Longshore v. United States*, 77 F.3d 440

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[8] *See generally* Note, The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment, 68 Va. L. Rev. 1537 (1982) (discussing various factors that may be relevant to deciding whether compensation is warranted).

(Fed. Cir.) (claiming that imposition of a fee for applying for a cellular radio license was a taking), *cert. denied*, 136 L. Ed. 2d 15, 117 S. Ct. 52 (1996).

In *Belk v. United States*, 858 F.2d 706 (Fed. Cir. 1988), plaintiffs were individuals who had been held hostage in the U.S. Embassy in Tehran, Iran.[9] The former hostages alleged that the Government took their property--their causes of action against Iran--by entering into the Algiers Accords with Iran, which extinguished their claims against Iran and secured their release from captivity. The court noted that "the President's action in implementing the Algiers Accords was primarily designed to benefit the hostages." *Id.* at 709. The court concluded that the Fifth Amendment did not require that compensation be paid the hostages because the hostages were the intended beneficiaries of the Government's action, although the action also incidentally benefited the American public. *Id.* at 709-10.

Plaintiffs here allege that a taking occurred, not when the Government entered into the Algiers Accords, but when the Government entered into the Settlement Agreement which espoused and settled their claims against Iran. As noted above, when the United States and Iran entered into the Settlement Agreement, approximately 2,200 small claims had been pending before the Tribunal for nine years, while only approximately eighty small claims had been settled. As a result of the Settlement Agreement, all of the small claims were referred to the Commission for evaluation. Each of the plaintiffs was paid in full the principal amount the Commission

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[9] Two of the 15 plaintiffs were wives of hostages.

determined as the value of the claim, plus a portion of the interest due on the claim.

In contrast to the claimants who had claims greater than $250,000, the Government represented the plaintiffs at the Tribunal, and negotiated a settlement with Iran for the small claimants on the best terms it could. Interestingly, "a great many" of the claims greater than $250,000 were also settled in an en bloc negotiated settlement. Lawrence W. Newman, A Personal History of Claims Arising Out of the Iranian Revolution, 27 N.Y.U.J. Int'l L. & Pol. 631, 643 (1995). Many claims are still pending before the Tribunal, and the remaining private claimants do not have the benefit of free representation by the Government. *See id.* at 644 ("The current pace in the Tribunal is slow. Hearings are few and far between and the Iranians appear to want things that way.").

Plaintiffs do not object to the valuation of their claims by the Commission. They argue that a taking occurred because the Settlement Agreement failed to provide for a complete payment of the interest on their claims. They argue that Belk is distinguishable because the small claimants were "profoundly discriminated against by the Settlement Agreement in comparison to the Large Claimants who, to this day, collect interest to the date of payment of their awards.... In sum the Settlement Agreement was a disaster for the Small Claimants, unless they prevail here."

We disagree with plaintiffs' assessment of the Settlement Agreement. The Settlement Agreement was entered into by the Government in an effort to resolve what had become a problem for the small claimants as well as for the Government, not to harm them or to gain a government benefit at their expense.

Where, as here, the private party is the particular intended beneficiary of the governmental activity, "fairness and justice" do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public. *Belk*, 858 F.2d at 709 (quoting *National Board of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92, 23 L. Ed. 2d 117, 89 S. Ct. 1511 (1969)). The fact that the Government also benefited from the Settlement Agreement (by settling a claim against Iran for $55 million) does not change the fact that the small claimants were substantially benefited as well.

Plaintiffs rely on *Meade v. United States*, 2 Ct. Cl. 224 (1866), *aff'd*, 76 U.S. (9 Wall.) 691, 19 L. Ed. 687 (1869), and *Gray v. United States*, 21 Ct. Cl. 340 (1886), for the proposition that extinguishment of a claim against a foreign government may be a compensable taking under the Fifth Amendment.[10] In *Meade*, plaintiff filed suit in the Court of Claims for an alleged taking by the United States of his claim against the government of Spain, which he alleged was espoused by the United States as part of the 1819 treaty between the United States and Spain. The court opined that extinguishment of a cause of action may be a compensable taking under the Fifth Amendment, but that Meade had no claim against the United States since under the treaty his exclusive remedy was before a special tribunal which had been set up to pay compensation for claims extinguished by the treaty. *Meade*, 2 Ct. Cl. at 275. The court held that, while in its opinion the tribunal erred in denying Meade's claim on the ground that his proof was insufficient, Meade had not appealed

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[10] The Government, in its response brief, did not favor us with its views regarding plaintiffs' reliance on these cases.

the tribunal's decision and the court had no power to reopen the matter. *Id.* at 263, 276-78.

Gray is a Court of Claims advisory opinion to Congress in one of the so-called "French Spoliation Cases," dealing with relations between the United States and the revolutionary French Government between the time of the execution of King Louis XVI and 1801. The opinion, reported at 21 Ct. Cl. 340, runs some sixty-five pages, in the course of which the court opined that "the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him." *Id.* at 392-93. At the end of the opinion the court noted, "we have been required not to investigate legal rights, based upon the doctrines and principles of the common law, but to inquire into and to report upon the ethical rights of a citizen against his Government; rights which are never enforceable except by the consent of the sovereign...." *Id.* at 406. No judgment or order as such was rendered.

Plaintiffs argue that the Court of Claims' statements in *Meade* and *Gray* apply in this case, and that the Tucker Act, 28 U.S.C.§ 1491(a)(1) (1994), now provides a remedy for these Fifth Amendment takings. We are not persuaded. For one, in neither *Meade* nor *Gray* were plaintiffs awarded a recovery. Thus the cited statements are dicta, and not binding law. For another, even if *Meade* and *Gray* correctly state propositions of law applicable to the circumstances of those cases at that time, the evolution of takings law in the last 100 years brings additional considerations to light.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), the Supreme

Court stated that the range of interests that qualify for protection as "property" under the Fifth Amendment are defined by existing rules or understandings that stem from an independent source such as state law. *Id.* at 1030. In that case the Court was considering the extent to which a regulatory imposition could prohibit development of the plaintiff's real estate. The Court held that background principles, there the state's basic nuisance law, defined the scope of the property right; if the reach of the regulation was coincident with the scope of the state's power to control nuisances, a power that inhered in all land titles, then no compensation would be due. *Id.*[11]

By like token, it does not strain *Lucas* beyond its intended purpose to recognize that a similar principle may apply to "property" that arises through consensual international transactions as it does to property interests created by domestic law. Certain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights. As the trial court correctly observed, those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.

Here, though the choses in action were extinguished, the Government provided an alternative tailored to the circumstances which produced a result as favorable to plaintiffs as could reasonably be expected. Plaintiffs have not shown that

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[11] Cf. *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1570-71 (Fed. Cir. 1994) (drawing the distinction between mere diminution resulting from shared participation in government action and compensable taking).

they sustained losses that were avoidable under the circumstances. Nor have they shown that those engaged in international transactions with Iran could not have anticipated the need for government intervention. A history of such interventions can been seen in *Meade* and *Gray*.[12] A compensable taking has not been established; the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.

CONCLUSION

Accordingly, we affirm the decision of the Court of Federal Claims.

CLEVENGER, Circuit Judge, joining the opinion of the court.

I join the opinion of the court. I write separately to emphasize the significance of this case, and to explain why I think the court's analysis and result is correct.

This case is significant in that it affords us the opportunity to recognize that the familiar *per se* taking and regulatory taking categories are not rigid, and that certain "*per se*" takings (i.e., those which involve a property owner being ousted from his property by government action--such as in this case) do not automatically result under the Fifth Amendment in compensation to the ousted property owner. In such instances,

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[12] See also *Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988) (noting the foreseeability of government interference in international commerce); *767 Third Avenue Assoc. v. United States*, 48 F.3d 1575, 1580-81 (Fed. Cir. 1995) (same).

whether or not the taking will require compensation depends on consideration of factors which are more familiarly applied in the regulatory takings setting, where property owners who remain in possession of their property complain of devaluation of the property as a result of governmental action. The familiar factors assessed to determine if a regulatory taking is compensable in essence articulate a rule of reason which attempts to resolve the collision of private expectations and the public interests asserted in support of the regulation.

The situation presented by this case is not entirely new to us. For example, we have held that the owners of a banking institution cannot prevail with a Fifth Amendment *per se* takings claim based on the seizure of their bank by federal banking regulators in the course of exercising their statutory duties to ensure the viability of the banking system. *See California Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992). In that case, the actions of the federal government resulted in no less an occupation of the plaintiffs' property than occurred when the government stepped into the shoes of the plaintiffs in this case, occupying, by espousal, their claims against Iran. Our decision in *California Housing* turned on the lack of any conceivable expectation by the plaintiffs that their property would not be occupied in the event circumstances compelled the regulators to close the facility. The license to engage in domestic banking in effect was subject to the condition of potential occupation of the private property by the government. That situation, we noted, is a far remove from the facts in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). In *Loretto*, the owner of a personal residence objected to installation by the government of cable television facilities on her property. For the Supreme Court, those facts invoked

> the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

Id. at 441. In my view, the plaintiffs in this case are also at a far remove from the plaintiff in *Loretto*, and can be viewed to have engaged in international commerce, here and in Iran, pursuant to an implied license. For the longest time, the Congress has regulated the participation by U.S. citizens in international commerce. The fundamental right to travel, necessary to find value in any form of international commerce, is subject to regulation, in peace time, as well as in times of war. The circumstances in which currency can be moved in international commerce is likewise regulated. I need not attempt to exhaust the list of factors related to international commerce on which there have been long-standing, and unchallenged, federal regulations.

When one ventures into international commerce, it is with the knowledge of the extent to which that marketplace is regulated, and with appreciation for the reasons which underlie such regulation, including the overriding need to enforce this nation's foreign policy. Indeed, many of the legal regulations pertaining to international commerce exist to benefit those who participate in that market. One who obtains, in the pursuit of international commerce, a claim against a foreign government knows that our government may deem it necessary to espouse that claim. In my view, the fact of espousal alone cannot prove the existence of a compensable taking. For that reason, the cause of the plaintiffs in this case must fail.

Just as the seizure of a failing bank may be deemed necessary to implement the safety of our banking system, espousal of one's claim may be necessary to effect the consistent application of valid governmental policies in the international arena. In each instance, the property owner has been ousted of its property, and the federal government has occupied that property for the benefit of the larger public. A *per se* taking has occurred, but the taking by espousal is not automatically compensable, because no rational international commerce plaintiff could unblushingly assert shock or surprise that its property was seized by espousal.

Some property interests carry with them the right to full use and complete enjoyment without any interference by occupation from the government. Implicit in that right is the expectation that if the government interferes by occupation, it will compensate. Ms. Loretto held such a property interest. Other property interests carry with them stated or implied conditions that less than full use and enjoyment is to be expected, and that governmental interference by occupation may or may not be compensable, depending on the circumstances of the governmental action. Even in international commerce, there surely are some property interests as to which the owner shares Ms. Loretto's expectations. The plaintiffs in this case, however, have made no attempt to demonstrate such expectations, beyond their bare assertion that every physical occupation must result in compensation. Furthermore, there may be instances in which the governmental interests in espousal are so weak, or otherwise in question, that an espoused plaintiff may successfully show, in a rule of reason analysis, entitlement to compensation. In this case, however, for the reasons articulated in the opinion of the Court of Federal Claims, and in the opinion of this court, the takings are not compensable.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 95-299 C

WALTER ABRAHIM-YOURI, et al.,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

36 Fed. Cl. 482

September 18, 1996, Filed

WIESE, Judge.

Plaintiffs seek just compensation for an alleged taking of their property. The taking, they contend, was precipitated by a settlement agreement, executed between the United States and Iran, that resolved certain claims against Iran that were awaiting adjudication before a special claims tribunal. Plaintiffs' property interests were among those affected by this settlement agreement. Their contention is that the settlement agreement failed to secure the full amount of compensation due them from Iran for the property losses at issue. Plaintiffs see the claimed shortfall in compensation as a taking by the United States.

The case is now before the court on plaintiffs' motion for partial summary judgment and defendant's cross-motion for

full summary judgment.[1] The matter has been fully briefed and oral argument was heard on July 31, 1996. We now decide in defendant's favor.

FACTS

On January 19, 1981, the United States of America and the Islamic Republic of Iran each gave formal approval to two declarations, drawn up by the Government of Algeria, setting forth principles and procedures for resolving a breach in relations then existing between the two signatory nations. These declarations, known generally as the Algiers Accords, brought to an end the crisis that had arisen between the United States and Iran as a result of the seizure of the United States Embassy and property in Tehran in November 1979 and the detention of United States diplomatic personnel in Iran following that seizure.

Among other matters, the declarations provided for the creation of an international arbitral tribunal, the Iran-United States Claims Tribunal (the Tribunal), to hear all claims against either country brought by nationals of the other arising "out of debts, contracts . . . expropriations or other measures other arising "out of debts, contracts . . . expropriations or other

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[1] In an earlier round of this litigation, the court had before it plaintiffs' motion for class certification and defendant's partial motion to dismiss for lack of jurisdiction. Neither motion was granted. A ruling on the request for class certification was deferred to a later stage of the proceedings; the motion for partial dismissal was denied because it addressed issues not actually raised by the complaint.

measures affecting property rights."[2] Such claims, it was specified, were to be presented to the Tribunal "either by claimants themselves or, in the case of claims less than $250,000, by the government of such national."[3] In addition to hearing claims by nationals of either country, the Tribunal was vested with jurisdiction to hear claims of either country against the other "arising out of contractual arrangements between them for the purchase and sale of goods and services."[4]

In the discharge of these functions, the Tribunal was directed to "decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."[5]

The Tribunal was intended to serve as the exclusive forum for the litigation of the claims over which it was given jurisdiction. Consistent with that purpose, the United States agreed "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran . . . to nullify all attachments and judgments obtained therein, to prohibit all further litigation

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[2] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), January 19, 1981, art. II, 20 I.L.M. 223, 231 (1981).

[3] *Id.*

[4] *Id.*

[5] *Id.* art. V.

based on such claims, and to bring about the termination of such claims through binding arbitration."[6] Additionally, to insure payment of all Tribunal awards in favor of United States nationals, the Accords provided for the establishment of an interest-bearing security account, initially to be funded with one billion dollars of blocked Iranian assets and thereafter to be maintained, through renewal deposits by Iran, at a minimum balance of $500 million.

Pursuant to the Accords, on April 1, 1981, the United States Department of State issued a public notice informing persons with claims against Iran amounting to less than $250,000 ("the small claims") to register their claims with the Department. Plaintiffs were among those individuals who registered claims in response to this notice. Thereafter, the Department of State submitted the small claims to the Tribunal; by January 19, 1982, some 2,782 small claims had been filed there.

Over the next several years, the United States and Iran directed their efforts to resolving the small claims. As of August 1989, however, only 82 small claims had been decided while over 2,200 small claims remained pending before the Tribunal.

In due course, the United States and Iran reached an agreement to settle the small claims of the United States nationals *en bloc*, along with a separate claim of the United States, for a total of $ 105,000,000. (The claim of the United States involved loans that had been extended to Iran by the

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[6] Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), January 19, 1981, General Principles, P B, 20 I.L.M. at 224.

United States Agency for International Development (A.I.D.)).[7] Claims of United States nationals involving amounts of $250,000 or more were unaffected by the agreement and consequently remained at the Tribunal for determination.

In return for payment to the United States of the lump-sum amount of $105,000,000, the settlement agreement provided for espousal of the small claims by the United States,[8] extinguishment of the small claims and also the United States' claim against Iran, transfer to Iran (by quitclaim) of all property interests underlying the small claims, and referral of the small claims to the Foreign Claims Settlement Commission[9] for final

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[7] The settlement agreement included not only those small claims of United States nationals filed with the Tribunal, but also small claims submitted to the State Department, which had not been filed with the Tribunal because the filing deadline had expired. The agreement also covered small claims that claimants had withdrawn from the Tribunal and claims that the Tribunal had dismissed for lack of jurisdiction.

[8] The "espousal" of a claim of a United States national by the United States occurs "when the government of the United States, usually through diplomatic channels, makes it the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the injury." Restatement (Second) Foreign Relations Law of the United States § 211 cmt.b (1965).

[9] The Foreign Claims Settlement Commission (formerly called the International Claims Commission) is an independent, adjudicatory body, responsible for deciding claims against foreign governments, referred for determination by Congress, that involve the expropriation of property belonging to the United States or its citizens. 22 U.S.C. §§ 1622, 1623 (1994). *See Dames & Moore v. Regan*, 453 U.S. 654, 680-81, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981) (discussing history of Foreign Claims Settlement Commission).

(continued...)

evaluation and determination of amount. The agreement did not, however, specifically provide for allocation of the $105 million between the small claims and the Government's claim.

On June 22, 1990, the Tribunal ratified the settlement agreement and issued an award on agreed terms. Thus, on that date, the settlement agreement became effective. On June 28, 1990, the Department of State transferred all small claims to the Commission for adjudication. On July 12, 1990, the Department of State directed the Department of the Treasury to allocate $55 million of the settlement amount to the satisfaction of the United States' claim arising out of the A.I.D. loans and $50 million for payment of the small claims referred to the Commission.

The Commission concluded its adjudication of the small claims by February 1995. A total of 3,066 claims were resolved. Of that number, 1,000 were upheld. In contrast to the proceedings before the Tribunal, the determinations of the Commission were based almost entirely upon presentations made by the claimants; the Government of Iran was not a party to the proceedings before the Commission. However, pursuant to the terms of the Settlement Agreement, the Commission was able to obtain from Iran numerous documents relating to the small claims.

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[9](...continued)
In 1985, the Foreign Claims Settlement Commission was given standby jurisdiction to adjudicate claims of United States nationals against Iran in the event a lump-sum settlement of those claims were to be concluded. Title V, Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 405, 437 (50 U.S.C. § 1701 note ("Iran Claims Settlement")).

The successful claimants received awards together with simple interest -- computed at approximately 10 percent -- measured from the date of the wrongful act giving rise to Iran's liability until June 22, 1990, the effective date of the settlement agreement. Interest was neither computed nor awarded for the period after June 22, 1990. In all, the Commission entered awards with an aggregate total value of $41,570,936.31 in principal and $44,984,859.31 in interest. Thus, the $50 million allocated for the satisfaction of the small claims was insufficient to pay the successful claimants the full amount of their interest award. (After payment of principal, the balance remaining, supplemented by interest earned on the settlement funds while on deposit, resulted in each claimant receiving approximately 34.5 percent of the interest amount the Commission had determined.)

Plaintiffs are among those whose claims were upheld by the Commission. Their suit here is premised on the view that the settlement agreement effected a taking of their claims against Iran; consequently, they contend that the value of those claims (as established by the Commission) must include interest measured from the date of expropriation -- the date of the wrongful act by Iran -- until the date payment is actually received. In short, they seek not only the balance of the interest that the Commission had determined but also interest beyond the Commission's interest cut-off date of June 22, 1990.

DISCUSSION

In *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960), the Supreme Court observed that the Fifth Amendment's guarantee that private property shall not be taken without the payment of just compensation "was designed to bar Government from forcing some people

alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Thus, the starting point for discussion here is whether the economic injury plaintiffs complain of -- the alleged insufficiency of the interest payments they received -- satisfies the requirements for a Fifth Amendment taking. In other words, is theirs a loss that in "all fairness and justice" ought to be shifted to the public rather than be shouldered by the plaintiffs alone?

Although there is no precise formula to rely on in determining the point at which Government interference with private property interests gives rise to a compensable taking, modern-day case law has adopted the use of a three-factor analysis in searching out an answer to the question. These factors, set forth in the Supreme Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), include: the extent to which the Government's action interferes with investment-backed expectations, the character of the Government's action, and the economic impact of the Government's action on the claimants. These considerations are examined below.

In assessing the reasonableness of investment-backed expectations, the question we ask is whether plaintiffs reasonably could have anticipated that their property interests might be adversely affected by Government action. Where such intrusion is foreseeable, the commitment of private resources to the creation of property interests is deemed to have been undertaken with that risk in mind; hence, the call for just compensation on grounds of fairness and justice is considerably diminished. *See, e.g., Connolly v. Pension Benefit Guaranty Corp. v. United States*, 475 U.S. 211, 227, 89 L. Ed. 2d 166, 106 S. Ct. 1018 (1986) ("Prudent employers . . . had more than

sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations.") and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984) ("Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration.").

Plaintiffs cannot lay claim to an investment-backed expectation free of the potential of Government involvement. Those who engage in international commerce do so in full awareness that the security of their enterprise is uniquely dependent on the maintenance of stability and good order in the relationships of the nations involved. Where those relationships become strained, the resulting frictions can adversely affect all subordinate interests since traditional remedies to the enforcement of rights may also have been rendered ineffectual. In that event, it is the hand of Government alone that can help restore the mutual amity upon which successful commerce depends. Since the observance of good order among nations can never be taken for granted, the potential for Government involvement in international commerce remains an ever-present fact of life for those who transact their business abroad. *Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988). Plaintiffs are charged with knowledge of this reality.

Moving on to the next factor -- the character of the Government's actions -- we note at once that, in the conduct of foreign relations, the President has the indisputable power to take up and to settle the claims of American citizens against foreign states and nationals. *United States v. Pink*, 315 U.S. 203, 240, 86 L. Ed. 796, 62 S. Ct. 552 (Frankfurter, J., concurring). Elaborating on this theme, the court in *Shanghai*

Power Co. v. United States, 4 Cl. Ct. 237, 244 (1983), *aff'd without opinion*, 765 F.2d 159, *cert. denied*, 474 U.S. 909 (1985), explained:

> When tensions arise between our nation and another, those caught in the middle must rely upon the President to safeguard their lives and property to the greatest extent possible. This may mean that others who have claims against the foreign sovereign may be blocked from seeking to collect their debts so that international tensions will not be exacerbated. Yet, in times of emergency, it is frequently entirely fortuitous who will benefit and who will suffer from any such presidential action. The possibility that the President will intervene in this manner is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. [footnote omitted].

The espousal of plaintiffs' claims, like the circumstances that generated the necessity for that action, are eventualities whose risks of occurrence plaintiffs are deemed to have assumed by virtue of their choice to engage in foreign commerce.

The last factor we consider is the economic impact of the Government's actions. As noted earlier, plaintiffs base their demand to just compensation on the premise that their claims for property losses were settled for an inadequate amount. They contend that, absent the settlement, their claims would have proceeded to an adjudication before the Tribunal and there -- the argument continues -- plaintiffs would have recovered the principal amount (which, in fact, they did

receive) as well as interest measured from the date of taking until the date payment was actually received.[10] (Of this latter amount, approximately 35 percent was recovered.)

There are two responses to plaintiffs' argument. First, and foremost, the argument relies on an erroneous comparison. The property losses that plaintiffs suffered were occasioned by Iran, not the United States. Hence, the question that needs to be asked is whether the settlement provided plaintiffs with any lesser amount than they could have recovered from Iran absent intervention on their behalf by the United States. Significantly, there is nothing in the record to suggest that plaintiffs would have fared as well, much less better, had they been forced to go it alone.

The other point to be made here is that plaintiffs' failure to obtain interest in the full amount claimed does not force upon them an extraordinary or unusual loss. To view the issue in another context, the rule has long prevailed that interest is

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[10] In the presentation of their case, plaintiffs make the argument that the settlement agreement amounted to a *per se* taking of their property. The argument reflects a misconception of law. A *per se* taking involves a displacement, by Government action, of the incidents of property ownership so complete in its character as to leave an owner without any possessory interests in the property. Examples include a permanent physical occupation of property by the Government, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982) or a regulation that categorically prohibits all economically beneficial use of land thereby destroying its value for private ownership, *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). We encounter neither of such extremes in this case. Indeed, as the Supreme Court noted in *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989), "it is artificial to view deductions of a percentage of a monetary award as physical appropriations of property." The same is true here.

not collectible on a debt due from the United States in the absence of an authorizing statute or contract term. Until the advent of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-614 (1994), this rule governed the allowance of contractor claims against the sovereign, *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588, 91 L. Ed. 521, 67 S. Ct. 398 (1947); in other areas it remains the controlling rule. *See e.g., Getty Oil Co. v. United States*, 767 F.2d 886 (Fed. Cir. 1985). Evaluated in light of this background, the court sees no compelling reason to view the alleged shortfall in plaintiffs' interest recovery as a burden which, in fairness and justice, should be allocated to the public as a whole.

CONCLUSION

Having considered the factors pertinent to our inquiry, the court is left with the certain conclusion that the events that befell plaintiffs were part of the risks they assumed in choosing to do business abroad. Accordingly, no principle of justice would support allocation to the public of the losses plaintiffs have claimed. In short, there was no taking of plaintiffs' property.

Based on the foregoing, plaintiffs' motion for partial summary judgment is denied and defendant's cross-motion for summary judgment is granted. The Clerk is directed to enter judgment dismissing the complaint.

APPENDIX C

SETTLEMENT AGREEMENT IN CLAIMS OF LESS THAN $250,000, CASE NO. 86 AND CASE NO. B38[1]

This Settlement Agreement ("Agreement") is made this 13th day of May, 1990 by and between the United States and the Islamic Republic of Iran (both as defined in Article I hereinbelow).

Whereas, pursuant to the provisions of the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims, dated January 19, 1981 ("Claims Settlement Declaration"), approximately 2800 Claims of less than $250,000 each and Case No. 86 have been filed by the United States on behalf of the Claimants with the Iran-United States Claims Tribunal ("the Tribunal");

Whereas, a number of the Claims of less than $250,000 filed with the Tribunal have already been adjudicated by the Tribunal, or settled or withdrawn by the parties, and a number are still pending before the Tribunal;

Whereas, the United States and the Islamic Republic of Iran desire to settle definitively, forever and with prejudice all disputes, differences, claims, counterclaims and matters outstanding or capable of arising in relation to the Claims of less than $250,000 and/or Case No. 86.

Whereas, the United States and the Islamic Republic of Iran also wish to settle definitively, forever and with prejudice all

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[1] Unofficial transcription prepared by the Foreign Claims Settlement Commission.

disputes, differences, claims and matters outstanding or capable of arising in relation to the claims filed in Case No. B38.

Now therefore, in consideration of, and under the terms, conditions, premises, covenants and other agreements contained herein, the United States and the Islamic Republic of Iran agree as follows:

Article I: Definitions

A. For the purposes of this Agreement, the term "the Claims of less than $250,000" means any and all of the claims of less than $250,000 each, which have been filed with the Tribunal by the United States on behalf of U.S. nationals, which claims are included in Cases Nos. 10001 through 12785, and which are still pending, whether or not recategorized as Official ("B") Claims by the Tribunal (such as claims contained in the cases currently numbered B76 and B77) and whether or not the amount of any of such claims is ultimately adjudicated to be more than $250,000. The United States and the Islamic Republic of Iran agree that claims of U.S. nationals for less than $250,000 which have been submitted to the United States Department of State but were not timely filed with the Tribunal, as well as claims of U.S. nationals for less than $250,000 which have been either withdrawn by the Claimants or dismissed by the Tribunal for lack of jurisdiction, shall be considered, for purposes of this Agreement, as Claims of less than $250,000. This term shall not include the claims in Cases 12129 and 12130, in which settlements have been concluded between the parties.

B. For the purposes of this Agreement, the term "the Claimants" means any and all of the natural or juridical persons

or other entities who have made the Claims of less than $250,000.

C. For the purposes of this Agreement, "the United States" means the Government of the United States Of America, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States of America or any political subdivision thereof. The term "the United States" also includes any and all of the Claimants.

D. For the purposes of this Agreement, "the Islamic Republic of Iran" means the Government of the Islamic Republic of Iran any political subdivision of the Islamic Republic of Iran, and any agency, instrumentality or entity controlled by the Government of the Islamic Republic of Iran or any political subdivision thereof.

E. For the purposes of this Agreement, the terms "the Claims of less than $250,000," "the Claimants," "the United States" and "the Islamic Republic of Iran" wherever used in this Agreement, whether below or above this Article, shall exclusively have the meaning ascribed to each of them under this Article.

Article II: The Subject Matter

The scope and subject matter of this Agreement are:

(i) to settle, dismiss, and terminate definitively, forever and with prejudice all the disputes, differences, claims, counterclaims and matters directly or indirectly raised or capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests

contained in, arising out of, or related to the Claims of less than $250,000, Case No. 86 and Case No. B38.

(ii) To quitclaim and transfer to the Islamic Republic of Iran property of the Claimants as specified in Article VII.

Article III: Settlement Amount

(i) In consideration of complete, full, final and definitive settlement, liquidation, discharge, and satisfaction of all the disputes, differences, claims, counterclaims and matters directly or indirectly raised or capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests contained in or related "to the Claims of less than $250,000, Case No. 86 and Case No. B38, the Government of the United States shall be deemed to have espoused the Claims of less than $250,000 and the comprehensive lump sum amount of U.S. $105,000,000 (one hundred and five million United States dollars), hereinafter referred to as "the Settlement Amount," shall be paid to the Government of the United States out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981. It is agreed that the Notification to the Escrow Agent of the Award on Agreed Terms shall not be issued prior to July 15, 1990, but shall be issued thereafter in the normal course.

(ii) The Government of the United States hereby attests, represents, and acknowledges that the Settlement Amount is the such amount to be paid in consideration of complete, full final and definitive settlement, liquidation, discharge and satisfaction of the Claims of less than $250,000, Case No. 86 and Case No. B38, and that after the payment of the Settlement Amount, the

Islamic Republic of Iran (including all respondents in the Claims of less than $250,000) shall not have to pay any other amount and/or shall not have to make any other consideration to the United States or any person whether natural or juridical, in relation to the Claims of less than $250,000, Case No. 86, and Case No. B38.

(iii) The Government of the United States shall place the Settlement Amount in one or more interest bearing accounts pending distribution. The distribution of the Settlement Amount falls within the sole competence and responsibility of the Government of the United States and shall in no way engage the responsibility of the Islamic Republic of Iran or any Iranian natural or juridical person.

(iv) The United States Department of State shall refer the Claims of less than $250,000 to the Foreign Claims Settlement Commission, United States Department of Justice, for adjudication.

(v) In adjudicating such claims, the Foreign Claims Settlement Commission shall apply Tribunal precedent concerning both jurisdiction and the merits, and shall take into account all issues including counterclaims and liens. Notwithstanding any other on will adjudicate on the merits any claim, among those settled by this Agreement, which the claimant demonstrates to the Commission's satisfaction could have been properly pursued in any forum other than the Tribunal. The Commission shall also take into account, as appropriate, any transfers under Article VII of this Agreement, without in any manner entailing any liability for the Islamic Republic of Iran or for any respondents in Claims of less than $250,000.

Appendix C

Article IV: Submission to the Tribunal

This Agreement is to be jointly submitted to the Tribunal on or before May 17, 1990 for the issuance of the Award on Agreed Terms. If this Agreement is not submitted by such date, or within such additional time as the parties may agree, or if it is not approved by the Tribunal, then it shall automatically become null and void and the parties, without prejudicing their respective rights, will be placed in the same position as they were in prior to the date of this Settlement Agreement.

Article V: Termination of the Claims

(i) Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, the United States shall cause, without delay, all proceedings against the Islamic Republic of Iran (including all respondents in the Claims of less than $250,000) in relation to the claims, counterclaims and matters related to the Claims of less than $250,000 and/or Case No. 86 and/or Case No. B38 in all courts, fora, or before any authority or administrative body to be definitely and with prejudice dismissed, withdrawn and terminated, and the United States shall be barred from instituting or continuing with any such proceedings (including interpretive disputes and official claims) before the Tribunal or any other forum authority or administrative body whatsoever, including but not limited to any court in the United States or the Islamic Republic of Iran. The foregoing shall not affect those proceedings which are envisioned by the United States in Article III (iv) and (v), and which Will not in any manner entail any liability for the Islamic Republic of Iran or for any respondents in Claims of less than $250,000.

(ii) Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, the Islamic Republic of Iran shall cause, without delay, all proceedings against the United States in relation to the claims, counterclaims and matters related to the Claims of less than $250,000 and/or Case No. 86 and/or Case No. B38 in all courts, fora, or before any authority or administrative body to be definitively and with prejudice dismissed, withdrawn and terminated and the Islamic Republic of Iran shall be barred from instituting or continuing with any such proceedings (including interpretive disputes and official claims) before the Tribunal or any other forum, authority or administrative body whatsoever, including but not limited to any court in the United States or the Islamic Republic of Iran.

Article VI: Releases

(i) Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, the United States shall release and forever and definitively discharge the Islamic Republic of Iran (including all respondents in the Claims of less than $250,000) from any and all claims, causes of action, rights, interests and demands, whether in rem or in personam, past, present or future, which have been raised, may in the future be raised or could have been raised in connection with disputes, differences, claims, counterclaims and matters stated in, related to, arising from, or capable of arising from the Claims of less than $250,000 and/or Case No. 86 and/or Case No. B38.

(ii) Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, the Islamic Republic of Iran shall release and forever and definitively discharge the United States from

any and all claims, causes of action, rights, interests and demands, whether in rem or in personam, past, present or future, which have been raised in connection with disputes, differences, claims, counterclaims and matters stated in, related to, arising, or capable of arising from the Claims of less than $250,000 and/or Case No. 86 and/or Case No. B38.

Article VII: Transfer of Rights, Etc.

Upon the issuance of the Award on Agreed Terms, and contemplation of the payment of the Settlement Amount, all of the Claimants' tangible and intangible assets, rights, properties and real estate, of any kind, located in the Islamic Republic of Iran, asserted in the Claims of less than $250,000 and/or Case No. 86, shall be quitclaimed and transferred unconditionally, irrevocably and without any right to recourse, "as is and where is," to the Islamic Republic of Iran.

Article VIII: Waiver of Costs

Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, the United States and the Islamic Republic of Iran shall waive any and all claims for costs against each other (including attorneys' fees) arising out of or related to the arbitration prosecution or defense of the claims and counterclaims asserted before the Tribunal, Iranian courts, United States courts or elsewhere with respect to matters involved or which could be involved in the Claims of less than $250,000, Case No. 86 and/or Case No. B38.

Appendix C

Article IX: Delivery of Documents

(i) Within three months of receipt of a written request from the Islamic Republic of Iran, the United States agrees to furnish the Islamic Republic of Iran copies of any formal statements of claims submitted by U.S. nationals to the Foreign Claims Settlement Commission, including documentary evidence, as well as the Commission's decisions with respect to the validity and amounts of such claims. The Commission shall require, as a precondition to granting compensation to a claimant that the claimant furnish any original share certificates and title deeds in his possession concerning assets, rights and properties transferred to the Islamic Republic of Iran under Article VII above. Following the adjudication of each claim the United States shall furnish such documents to the Islamic Republic of Iran. Where a claimant is able, on justifiable grounds, to prove that the originals of such documents are not in his possession, the Commission shall require from him a notarized affidavit in which the claimant sets out reasons for not being in possession of the originals of the said documents, and waiving his rights thereto. In such cases, the United States shall furnish the Islamic Republic of Iran with submitted affidavits and copies of the documents at issue.

(ii) Within three months of receipt of a written request from the Government of the United States, and for a period up to three years following the issuance by the Tribunal of the Award on Agreed Terms, the Islamic Republic of Iran agrees to furnish to the Government of the United States available documents, information, evidence, and records, including details as to the ownership an value of property, rights and interests pertaining to any of the Claims of less than $250,000.

Article X: Property in the United States

At any time prior to adjudication by the Foreign Claims Settlement Commission, the interested parties to any of the Claims of less than $250,000 may reach agreements concerning the delivery to the Islamic Republic of Iran of tangible property located in the United States. To become effective, any such agreement must be submitted to, and approved by the Commission which shall upon approval authorize any payment due from the Settlement Amount Property shall be transferred to the Islamic Republic of Iran pursuant to such agreements in accordance with United States law.

Article XI: Effect on Other Cases

This Agreement is for the sole purpose of settling the dispute identified herein. Nothing in this Settlement Agreement shall be relied upon, or construed as relevant to, or affect in any way, any arguments the United States or the Islamic Republic of Iran have raised, or may raise, concerning the jurisdiction or the merits of other cases whether before the Tribunal or any other forum.

Article XII: Construction

For the purpose of construction and interpretation of this Settlement Agreement, the entire Agreement shall be read and construed as a whole without giving any specific effect to any article separately.

Article XIII: Self-Execution

Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement

Amount, the releases, dismissals, waivers, withdrawals, and transfers of property located in Iran, contained and referred to in this Settlement Agreement shall automatically become self-executing.

Article XIV: Empowerment

The representatives of the Islamic Republic of Iran and the United States hereby expressly declare that they are duly empowered to enter into and execute this Settlement Agreement.

Article XV: Equality of Texts

This Settlement Agreement has been written and signed in both the Persian and English languages and each text shall have the same and equal validity.

FOR THE ISLAMIC REPUBLIC OF IRAN	FOR THE UNITED STATES
BY: /S/ ALINOBARI	BY: /S/ TIMOTHY E. RAMISH
DATE: MAY 14, 1990	DATE: MAY 13, 1990

APPENDIX D

HALLIBURTON CORP. v. COMMISSIONER

No. 9797-86 (U.S. Tax Ct.)

DIRECT EXAMINATION OF
LLOYD N. CUTLER, ESQUIRE
April 4, 1989

Transcript at 641-42

CYNTHIA J. MATTSON:[1] And what effect, if any, did the judicial proceedings and attachments that commenced in 1979 against the frozen assets in the United States have in terms of the U.S. Executive's negotiating position for the release of the hostages?

LLOYD N. CUTLER: We debated a long time over whether or not to allow the suits and the attachments and the set-offs, all of which could have been prohibited under IEEPA.

The arguments in favor of allowing them were that the freeze order itself might be subject to successful legal challenge, particularly with respect to the bulk of the assets located in our branch banks abroad, and that if we permitted attachments and suits and set-offs, we would be adding a belt to suspenders, or the other way around, and we would increase the difficulty and ability of Iran to lay its hands on those assets.

On the other hand, we recognized that if we did that, and if a sufficient number of suits and attachments and

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[1] Counsel for the Commissioner of the Internal Revenue.

set-offs occurred, that we could not unilaterally lift the freeze under the Takings Clause, to provide some alternative remedy at the time that we took the action lifting the freeze. And we decided on balance, it was better to go ahead and add the belt to the suspenders, rather than sit there and block all actions.

MATTSON: In December --

CUTLER: We knew what we were doing. We knew we were substantially buttressing the position of American claimants, and at least creating an obligation on the part of the United States, if it wished to lift that freeze, to provide a satisfactory alternative method of compensation.

Transcript at 645-47

MATTSON: We know that the Ayatollah Khomeini set forth on September 12, 1980, a four-point proposal for the release of the hostages. They would release the hostages if the United States Government agreed to non-intervention in Iran; agreed to return the frozen assets; cancelled the claims of US nationals against Iran; and returned the Shah's assets.

We also know that this event marked the beginning of a very complicated settlement, that took place in January of 1981, that included not only the release of the hostages, but an avenue of economic recovery for US claimants.

My question is, Mr. Cutler, why didn't the United Executive simply release all $12 billion of Iran's frozen assets and cancel all of the claims against Iran?

CUTLER: Well, there were two essential reasons. The first was what you might call a legal reason, and that is that the United States constitutionally, in our judgement, could not do that without, at the same time, providing an alternative satisfactory method of just compensation.

And it was very difficult for use to explain that point to the Iranians, especially having to do it through the Algerians, because the Iranians do not have an American style constitution with anything resembling our Fifth Amendment.

The second reason was essentially a political reason, or reason of honor, if you would, that that would have been paying a ransom. That would have been to release all claims of American nationals in exchange for the return of the hostages.

MATTSON: Early in your testimony, you indicated, concerning the negotiations with Iran, possible outcomes of the Iran hostage crisis. Could you tell the Court what the potential outcomes of the crisis were?

CUTLER: I think it was clear, once the hostages were taken, that the resolution would have to take the form either of a settlement, either the release of the hostages followed by a settlement of various Iranian/US cross claims, or, if there were an impasse that continued too long, or if there were some harm done to the hostages, such as a trial, we would have used force to regain the force, even at the risk of the lives of some of the hostages. And that, as part of our use of force, we would have vested the Iranian assets as distinguished from freezing them. By vesting them, I mean, in effect confiscating them as enemy property, and making them the property of the United States, in

which case they would have been available for the payment of American claims.

Transcript at 655-56

CUTLER: . . . If your question is would the final solution have involved an honorable solution, including some procedure for taking care of the U.S. claimants, I think the answer to that was the information was publicly available that that would happen, whatever the final solution..

That is, whether you assume a successful negotiation, or war, or a rescue mission, or state of hostilities with Iran, whatever happened, those assets, once we put them in play, to borrow a phrase from a later time of takeovers, etcetera, those assets were going to be applied, in one way or another, to the payment of the claims.

THE COURT: Certainly not all of the assets? It didn't end up that all of the assets were.

CUTLER: Not all of the assets, that's certainly true.

THE COURT: Only a portion of them, perhaps.

THE WITNESS: Well, it may well be that the amount of valid claims is substantially below the value of the assets. That isn't clear yet.

DAVID HARVIN: It may be the other way around, correct?

CUTLER: It may be the other way around, but even then, there are available lawsuits to the extent the assets are insufficient to pay valid claims.

The United States Government, under the *Dames and Moore* case, and under the predecessor cases, the *Blanchette* case, which existed before-hand, had, has and will continue to have, an obligation to pay just compensation.

So whoever has a valid claim, let's say a claim adjudicated by the Iran/US Tribunal for $100 million which the Iranians don't pay, will have a just compensation claim against the Government of the United States. It's almost a lock lawsuit.

APPENDIX E

WALTER ABRAHIM-YOURI, ET AL.,	)	
Plaintiffs,	)	
v.	)	No. 95-299C
THE UNITED STATES,	)	(Judge Wiese)
Defendant.	)	

City of Washington)
) ss.
District of Columbia)

AFFIDAVIT OF LEWIS M. JOHNSON

Lewis M. Johnson, being duly sworn, hereby deposes and states as follows:

1. I am a member of the bar of this Court, and, along with counsel of record Mr. Truitt, represent plaintiffs in the captioned action.

2. I have analyzed each of the awards in reported cases of the Iran-United States Claims Tribunal published in volumes 1 through 27 of the Tribunal reporter, 1982 through 1991.

3. Of the reported awards, 124 large claims were adjudicated in favor of U.S. claimants.

4. Of the reported awards, 165 awards on agreed terms, in favor of U.S. claimants.

5. Of the reported awards, 102 large claims were adjudicated against U.S. claimants.

6. Thus, of the 226 large cases completed by adjudication, 55% were adjudicated in favor of the U.S. claimant. Fully 74% of U.S. large claim claimants received an award -- either by adjudication or on agreed terms.

7. Of the reported awards, 19 small claims were adjudicated in favor of U.S. claimants.

8. Of the reported awards, 71 awards on agreed terms, in favor of U.S. claimants, were entered in small claims.

9. Of the reported awards, 13 small claims were adjudicated against U.S. claimants.

10. Thus, of the 32 small claims completed by adjudication, 59% were adjudicated in favor of U.S. claimants. Fully 87% percent of small claimants received an award, whether on agreed terms or by adjudication.

11. Some notes about my methodology are in order:

a. In cases where there was a partial award for the U.S. claimant on liability, but the case was finally settled on agreed terms as to the amount, it was counted as an award for claimant.

b. Where one award was made for several cases, each of the cases adjudicated was counted.

c. Where one case had several claims, the case was counted as one case for claimant, if he prevailed on one or more claims.

Lewis M. Johnson

Subscribed and sworn before me
this 5th day of June, 1996

Yvette C. Walters
Notary Public

APPENDIX F

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of	}	
	}	
CLIFFORD F. GURNEY	}	Claim No. IR-1317
	}	Decision No. IR-1126
Against the Government of the	}	
Islamic Republic of Iran	}	

Counsel for Claimant: Lewis M. Johnson, Esq.
John A. Westberg, Esq.
Westberg & Johnson

Hearing on the record held on September 23, 1994

FINAL DECISION

This claim in the amended amount of $100,000.00 against the Government of the Islamic Republic of Iran ("the Iranian Government") is based upon financial losses related to the termination of the claimant's employment with the Embassy of Iran.

By Proposed Decision entered in this claim on March 22, 1993, the Commission found the claimant entitled to an award in the principal amount of $18,768.75, plus interest of $20,138.87, as a lump-sum retirement benefit which represented one month's salary for each of the 16.5 years that he had worked at the Iranian Embassy in Washington, D.C., prior to the termination

of his employment by the Embassy in September 1979. However, the Commission denied the remaining portion of his claim, in the amount of $18,200.00, which was based on the termination of his employment contract, because the record did not support his assertion that a discharged employee may continue to receive his salary until other suitable employment is found."

By a letter dated March 30, 1992, the claimant filed objection to the Proposed Decision. Thereafter, by letter dated July 19, 1993, claimant's attorneys filed a "Memorial in Opposition to Proposed Decision" directed solely to Section I, "Retirement Claim." However, the claimant has not objected to Section II, of Proposed Decision, "Termination of Contract Claim."

In his Memorial in Opposition, the claimant contends that his services to the Iranian Embassy were such that the Commission should find him entitled to compensation at the rate of three months' salary for each year of completed service. In support of this contention, the claimant has submitted two statements from the Embassy's last Chief of Mission under the former Iranian government, an affidavit from an immediate superior at the Embassy, and other affidavits from individuals who were familiar with the high quality of his work.

The Commission has carefully considered the claimant's submissions and has again reviewed the entire record in his claim. The Commission has also familiarized itself with Article 2 of the Iranian Civil Employment Act of 1967, as amended, *Majmuah'i Kamili Qavanini Istikhdami'i Kishvari (Complete* Compilation of the Civil Employment Laws], A. Tarazandeh, *comp.,* at 27, Tehran, 1983 [in Persian], which provided that during the period in question, the Ministry of

Foreign Affairs was subject to its own laws and regulations, regarding employment and retirement of its employees.

Further, the Commission notes that Article 85 of the Law on Employment of the Ministry of Foreign Affairs of 1973, as amended, at 551 in the above-cited source, provides as follows:

> The Ministry of Foreign Affairs shall prepare separate regulations concerning employment and retirement of the local employees of its foreign missions and shall put such regulations into force after being approved by the Organization of Civil Employment and Administrative Affairs and the Council of Ministers.

The Commission has been unable to locate any separate regulations regarding employment and retirement of the local employees of the Ministry of Foreign Affairs. However, the Commission notes that the claimant has not referred it to any other instance where a long-term local employee was granted a retirement benefit on the same basis as that which he seeks, or any other evidence or authority to support his claim for the benefit he seeks. Nonetheless, the Commission is persuaded that an increase in the amount of the award made in the Proposed Decision is warranted.

The affidavits of the former Ambassador and other colleagues of the claimant at the Embassy express the view that a long-term employee such as the claimant would normally have been entitled to a pension of two or three times his final monthly salary. However, the Commission's review of employment contracts of Iranian entities such as Iran National

Airlines ("Iran Air") and National Iranian Oil Company ("NIOC") suggests that, where provided for, the normal level of lump-sum severance or retirement payments was in the range of one month's salary for every year worked (Iran Air) to one and one-half month's salary for every year worked (NIOC). The Commission recognizes that a Chief of Mission would have had great latitude and discretion to grant retirement benefits to a long-term employee. However, it is also noteworthy that the Ambassador's statement was that "a payment of at least two *if not* three times his monthly salary for each year of service would have been in order." (Emphasis added.) In the absence of evidence that any other former long-term employee of the Embassy actually had received the equivalent of three times his or her monthly salary for each year of service, as a retirement benefit, the Commission therefore determines that the claimant is entitled to an award for unpaid retirement benefits equivalent to two months' salary for each year of service, or $37,537.50. Accordingly, claimant is entitled to a revised award in this amount, dating from September 27, 1979.

In accordance with Tribunal precedents, recognized principles of international law, and its decisions in previous claims programs, the Commission concludes that claimant is entitled to interest as part of the principal award made to him herein amounting to 10 percent simple interest per annum from September 27, 1979, to June 22, 1990, the effective date of the Settlement Agreement. Accordingly, claimant is also entitled herein to an award of interest of 107.3 percent of the principal award, or $40,277.74.

Appendix F

CONCLUSION

For the reasons stated in the foregoing, the Commission withdraws the award granted in the Proposed Decision, and instead enters the revised award set forth below, which will be certified to the Department of the Treasury for payment in accordance with section 501(b) of the Iran Claims Act. In all other respects, the Proposed Decision is affirmed. This constitutes the Commission's final determination in this claim.

AWARD

Claimant, CLIFFORD F. GURNEY, is entitled to an award in the principal amount of Thirty-Seven Thousand Five Hundred Thirty-Seven Dollars and Fifty Cents ($37,537.50), plus interest from September 27, 1979 to June 22, 1990, in the amount of Forty Thousand Two Hundred Seventy-Seven Dollars and Seventy-Four Cents ($40,277.74), for a total award of Seventy-Seven Thousand Eight Hundred Fifteen Dollars and Twenty-Four Cents ($77,815.24).

Dated at Washington, DC and
entered as the Final
Decision of the Commission

Frank H. Conway,
Commission

APPENDIX G

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of	}	
	}	
DARA ZARGAR	}	
LINA ZARGAR SAMIMY	}	Claim Nos. IR-2683
	}	IR-2684
Against the Government of the	}	Decision No. IR-2327
Islamic Republic of Iran	}	

Counsel for Claimant: John A. Westberg, Esquire
Westberg & Johnson

Oral Hearing held on September 22, 1994.

FINAL DECISION

These claims, in the amended aggregate amount of $498,000.00, against the Government of the Islamic Republic of Iran ("the Iranian Government"), based are base on the expropriation of claimants' real property located in Iran.

By Proposed Decision issued on July 27, 1994, the Commission granted each claimant a principal award of $90,000.00, together with interest of $27,425.00, for loss of a plot of land in Aghdassieh, Tehran, and an apartment building and surrounding land, also in Tehran, based respectively on findings that the plot in Aghdassieh was the subject of an uncompensated expropriation by the Government of Iran in 1979, and that the building and land was transferred to the

Iranian Government by operation of Article VII of the Settlement Agreement as of June 22, 1990.

By letter dated August 12, 1994, the claimants, through their attorney, objected to the valuation of the undeveloped land In Aghdassieh, and to the Commission's Findings with regard to the apartment building, and requested an oral hearing. A hearing, at which DARA ZARGAR and two witnesses were present, was held on September 22, 1994. By written submissions and oral arguments to the Commission, the claimants contend that the Commission's determination of the value of the Aghdassieh land is "in error". Claimants also contended that the Commission failed to consider Iran's liability with respect to the apartment building in terms of "other measures affecting property rights" during 1979-1980, and that the Commission failed to follow Tribunal precedent as to the correct rate of exchange in determining the value of the apartment building as of June 22, 1990.

DISCUSSION

A. Undeveloped Land

In their objection, claimants argue that the evidence they submitted in support of the valuation of this plot of undeveloped land establishes that the value of their land was "more than three times higher" than the amount determined in the Proposed Decision, because of its location in a prime residential area in the foothills of the Alborz mountains, which is adjacent to the Niavaran Palace. According to the claimants, the appraisal, which was made by a professional appraiser who prior to the Islamic Revolution was licensed by the Iranian Ministry of Justice, values the land, as of 1979, at the equivalent of $168,439.71. Alternatively, based on verbal

information said to have been obtained from various sources in Iran, they assert that the land was valued at the equivalent of $170,212.76 as of 1979. Claimants also assert that the process by which "actual market values" of land is determined in Iran, "can be confusing" and therefore, the Commission should also take into account the affidavit by an individual who was an "experienced, official accountant in Iran", who explains the different processes, and shows that the "actual market value" of land "in most cases is substantially higher than the appraised values of official appraisers".

The Commission has reviewed the record as supplemented, including the affidavits, testimony from the appraiser and accountant and other additional evidence and information submitted before and during the hearing. Based on the evidence, the Commission is persuaded that an increase in the amount of the awards made in the Proposed Decision for the undeveloped land is warranted. Based on all of the evidence and information submitted by the claimants, and taking into consideration the official appraisals, testimony, size and other characteristics of the parcel of land, and having compared the Aghdassieh land with similar properties for which values have been determined in other claims, the Commission now finds that the fair market value of the parcel of undeveloped land in Aghdassieh, Tehran, which covered an area of 1,250 square meters, was $100,000.00 at the time of loss. Accordingly, each claimant is entitled to one-half of this amount, or $50,000.00, dating from July 2, 1979.

B. Apartment Building

Claimants' contend that since the Commission has not found the apartment building, and surrounding land to have been expropriated as of January 19, 1981, then it must find that

their property was subject to "other measures affecting property rights" during the period from 1979 through 1980. Claimants argue that although these "other measures" were to a "lesser degree" than an actual expropriation, they still interfered with their use and enjoyment of the property and thus, affected their property rights, within the meaning of the Algiers Accords. According to the claimants, these "other measures" included anti-American acts in 1979 which caused hostility towards Americans; the assault on the American Embassy in Tehran on February 14, 1979, and the holding of 101 hostages for a brief period; the assault on the Embassy on November 4, 1979, followed by the holding of the 50 Americans for 444 days; the adoption and commencement in 1979 of an official policy of persecution of Jews and Bahais; and the adoption of certain laws and regulations in Iran in 1979, which prevented any significant business transactions, specifically transactions having a value of more than 1,000,000 Rials. Claimants' contention is that these actions establish beyond question that in 1979, the claimants were prevented from returning to Iran to dispose of their properties, and that they need only show that these measures interfered with their use and enjoyment of their property. Claimants also contend that their situation is analogous to the "well founded fear of persecution" test used by the Board of Immigration Appeals in asylum cases, and that although asylum cases are different from claims before the Commission, the evidence seen in the claims of the Elghanayan and the Aryeh families is clear evidence of an "official Iranian bias against Jews", and is therefore a bias against the claimants, who are also Jewish.

In support of this portion of their objection, claimants have also referred to three cases where the Tribunal has either defined or discussed "other measures affecting property

rights".[1] However, the Commission notes that in all three of these cases, the acts of interference discussed were actions taken by the Iranian Government and directed specifically against the particular claimants and their property. In *Eastman Kodak,* the Tribunal held that the Iranian Government's interference with the claimant's subsidiary did not rise to the level of expropriation, but held that there was specific interference which caused damage to the claimant and constituted "other measures affecting property rights". *In Foremost,* the Tribunal found that the suspension of payment of profits and dividends to foreign shareholders, which was directed specifically against the claimant, was an interference with the claimant's rights which resulted in a deprivation and thus crave rise co a compensable claim. The Tribunal, in discussing "other measures" in *Tippetts,* stated that the effect of the measures against the owner is more important than the form of the measures, and the deprivation caused by the interference has to be more than merely ephemeral".

In the present case, the claimants have argued that the actions and events they have cited constituted "other measures" which interfered with their use and enjoyment of their property. However, claimants have not pointed to any specific instance in which an Iranian Government official or agency took any measure against them which interfered with their use and enjoyment, or prevented them from disposing of their property, thus causing them damage. In fact, in an earlier statement to

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[1] *Eastman Kodak Company, et al. v. The Government of Iran,*' Award No. 329-227/12384-3 (Partial Award, 1987), Award No. 514-227-3 (1989); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran,*' Award No. 141-7-2 (1984); *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran,*' Award No. 220-37/231-1 (1986).

the Department of State, DARA ZARGAR stated that the two tenants in their building, continued paying rent until early 1980, and the reason why they ceased doing so thereafter is nowhere stated or reflected in the record.

In summary, therefore, although the Commission has carefully reviewed the claimants' arguments, statements and various other documents and materials submitted in support of their claim, it is not persuaded that, as of January 19, 1981, claimants had been deprived of the use and enjoyment of their apartment building by the Iranian Government, either through expropriation or other taking or as a result of "other measures affecting property rights," so as to give rise to a compensable claim under the Algiers Accords, Settlement Agreement, and the relevant precedent decisions of the Tribunal. The Commission is well aware of the intense anti-American conditions that existed in Iran in 1979, and the injuries to -- Americans and losses of their property which occurred as a result, and is also aware that the Iranian government committed numerous violations of the Treaty of Amity, specifically in connection with the seizure of the United States Embassy in Tehran in November 1979. However, the Tribunal has expressly held that the creation or existence of those hostile conditions was not sufficient in itself to serve as a basis for finding, the Iranian Government responsible for a claimant's losses in Iran. *Alfred L. W. Short v. The Islamic Republic of Iran, Award No. 312-11135-3 (1987); Jack Rankin v. The Islamic Republic of Iran,* Award No. 326-10913-2 (1987). Rather, a claimant must establish that a specific, intentional pronouncement, action, or omission of the former or present Iranian government caused or could reasonably be expected to have caused the claimed loss. *Id.*

Furthermore, the Commission is aware that approximately thirty thousand Jews still reside in Iran, and are allowed to practice their religion.[2] In addition, Jewish candidates participate in the election process and Jews are represented, in proportion to their numbers as a religious 'minority,' in the Majlis, Iran's unicameral parliament.[3]

Accordingly, the Commission determines that its denial of the claimants' claim for compensation based on the expropriation or other taking of their apartment building by the Iranian Government before January 19, 1981, or as a result of "other measures affecting property rights" directed against them by that government prior to January 19, 1981, must be and it is hereby affirmed.

With regard to the valuation of the apartment building, claimants contend that although the Commission determined that they were entitled to awards for the loss of the property under Article VII of the Settlement Agreement, the Commission erred in using the free market exchange rate, as opposed to the official market rate published by the Central Bank of Iran. Claimants argue that the Commission is required to follow Tribunal precedent and cite as authority *Starrett Housing Corporation v. The Islamic Republic of* Iran, Award No. 314-24-1 (1987), where the Tribunal determined that unless a different rate was agreed upon between parties, the official exchange rate should be used "in the normal course of events" where the claimant would "have repatriated the funds

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[2] See Article 13 of the Iranian Constitution which lists Jews as a recognized religious minority group.

[3] Robin Wright, *A Reporter At Large A Teheran Spring*, The New Yorker, June 22, 1992.

if they had been received on the date they were due." The claimants also cite *McCullough & Company, Inc. v. The Ministry of Post, Telegraph and Telephone, et al.* Award No. 225-89-3 (1986), where the Tribunal used the official exchange rate and held that "it would be inequitable to oblige the claimant . . . to suffer the full extent of such depreciation when the payments it should have received were delayed as a consequence of breaches of contract by the Respondents."

The Commission has reviewed the record as supplemented, including the arguments put forth at the oral hearing. However, as to the claimants' argument concerning the applicable exchange rate, the Commission notes that the Tribunal has never decided a claim involving expropriation of property after January 19, 1981, or any other type of claim that arose after January 19, 1981. In addition, the Tribunal decisions cited by the claimants involve commercial contracts, under which payment by the Iranian entity based on an expected or foreseeable exchange rate was held to be part of the agreement between the parties when the contracts were signed. In contrast, in determining the value of real property, the essential consideration is the property's actual, *i.e.*, fair market value at the time of the loss, in this case June 22, 1990. Had the claimants sold their apartment building at that time, the price would have reflected the value of the property, whether in terms of rials or some other currency, as compared with the value of other goods or services that could have been purchased with that amount of rials or other currency. To disregard this basic economic reality would be to place a wholly artificial value on the claimants' property.

Claimants also contend that their argument is supported by the fact that the Iranian Government has continued to use the official rate of exchange in charging, fees for visas and other

official documents and services. However, the charges which that government assesses for such services, whether in rials or some other currency, is strictly a domestic matter, reflecting what it considers to be their value or their actual cost, or some portion thereof.

Nevertheless, based on a review of all the evidence, including the testimony by Mr. Zargar and other witnesses, and taking into consideration the size of the apartment building and its location in Hassanabad, Tehran, the Commission is persuaded that an increase in the valuation of this property is also warranted. Accordingly, the Commission now finds that the claimants' three-story apartment building and underlying and surrounding land, consisting of a total of 717 square meters, had a value of approximately 420,000,000 rials as of June 22, 1990, and that this value was equivalent to $288,000.00, based on the then-prevailing market conversion rate between the rial and the United States dollar. Accordingly, each claimant is entitled to one-half of this amount, or $144,000.00.

In summary therefore, each claimant is entitled herein to a total principal award of $194,000.00.

In accordance with Tribunal precedents, recognized principles of international law and its decisions in previous claims programs, the Commission further concludes that the claimants are entitled to interest as part of their awards for the undeveloped land in Aghdassieh, amounting to 10 percent simple interest per annum from July 2, 1979 to June 22, 1990, the effective date of the Settlement Agreement. Accordingly, each claimant is also entitled herein to an award of interest of 109.7 percent of his or her principal award, or $54,850.00.

However, with regard to the apartment building and surrounding land, the date of the loss has been established as the effective date of the Settlement Agreement. Therefore, claimants are not entitled to interest as part of the awards in this portion of their claims. *See Claim of LYLE L. TOWNSEND Against the Government of the Islamic Republic of Iran,* Claim No. IR-0918, Decision No. IR-0146 (1992).

CONCLUSION

For the reasons stated in the foregoing paragraphs, the Commission withdraws the previous awards set forth in the Proposed Decision, and instead enters revised awards as set forth below. These awards will be certified to the Secretary of the Treasury for payment in accordance with subsection 501(b) of the Iran Claims Act. In all other respects, the Proposed Decision is affirmed. This constitutes the Commission's final determination in these claims.

AWARDS

Claimant, DARA ZARGAR, is entitled to an award in the principal amount of One Hundred Ninety-Four Thousand Dollars ($194,000.00), plus interest on $50,000.00 from July 2, 1979, to June 22, 1990, in the amount of Fifty-Four Thousand Eight Hundred Fifty Dollars ($54,850.00), for a total award of Two Hundred Forty-Eight Thousand Eight Hundred Fifty Dollars ($248,850.00).

Claimant, LINA ZARGAR SAMIMY, is entitled to an award in the principal amount of One Hundred Ninety-Four Thousand Dollars ($194,000.00), plus interest on $50,000.00 from July 2, 1979, to June 22, 1990, in the amount of Fifty-Four Thousand Eight Hundred Fifty Dollars

($54,850.00), for a total award of Two Hundred Forty-Eight Thousand Eight Hundred Fifty Dollars ($248,850.00).

Dated at Washington, DC and entered as the Final Decision of the Commission.

Delissa A. Ridgway
Chair

Benjamin F. Marsh
Commissioner

Frank H. Conway
Commissioner

APPENDIX H

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of	}	
	}	
MEHRDAD AZARMI	}	Claim No. IR-3204
	}	
Against the Government of the Islamic Republic of Iran	}	Decision No. IR-2356

Counsel for Claimant: John A. Westberg, Esq.
Westberg & Johnson

FINAL DECISION

This claim in the amended amount of $249,999.99 against the Government of the Islamic Republic of Iran ("the Iranian Government") is based on the alleged expropriation of the claimant's real properties in Iran.

By Proposed Decision issued on August 24, 1994, the Commission denied claimant's claim, based on its determination that the claimant was not a national of the United States at the time his properties were allegedly confiscated.

By letter dated August 31, 1994, the claimant objected to the Commission's Proposed Decision and requested an oral hearing. An oral hearing was scheduled for October 25, 1994 but was continued at the request of the claimant's attorneys. Subsequently, the oral hearing was rescheduled for and held on December 12, 1994.

Appendix H

In submissions and testimony at the oral hearing, the claimant stated that he had been under the mistaken belief that he had left Iran in 1978 whereas an examination of his passport verified that in fact he had left Iran in February 1979. As a result, his assertion that his properties were confiscated in 1979 was similarly incorrect. He testified that his property located in the Mirdamad area of Tehran had been occupied as of December 1980 by someone whom he believed to be connected with the Iranian Government entity the "Foundation for the Oppressed." In support of this assertion, the claimant submitted affidavits by three neighbors in Tehran, who averred that they each recalled an individual occupying the claimant's residence as of December 22, 1980. The individual who had obtained the affidavits from the affiants was present at the hearing and he testified as to his conversations with the affiants regarding, their recollections.

The claimant, through his attorneys, contended that the Commission should not require a claimant to point to a specific act or statement by the Government of Iran to establish that he has been denied access to his property. The claimant further argued that the Commission should hold the Iranian Government liable for his losses on the basis of "other measures affecting, property rights," or that he should be found entitled to compensation on the ground that his property rights were transferred to the Iranian Government under Article VII of the June 22, 1990 claims settlement agreement between the United States and Iran (the "Settlement Agreement").

Appendix H

DISCUSSION

I. Jurisdiction - Dominant and Effective Nationality

The record reflects that the claimant was born in Iran, immigrated to the United States, and became a naturalized citizen in 1980. Accordingly, the claimant is a dual national of Iran and the United States.

Before jurisdiction may be assumed over the claim of a dual national, the claimant must establish that his or her dominant and effective nationality during the relevant period from the date the claim arose until January 19, 1981 was that of the United States. *Reza Said Malek v. the Government of Iran, Award No. ITL 68-193-3 (1988).* The determination of dominant and effective nationality requires consideration of "all relevant factors, including habitual residence, center of interests, family ties, participation in public Life and other evidence of attachment." *Zaman Azar Nourafchan v. The Islamic Republic of Iran,* Award No. ITL 75-412-3 p. 5 (1989) *citing Case No. A18,* Decision 32-A18-FT p. 25 (1984). The test is whether in the period preceding, contemporaneous with and following the claimant's naturalization as a United States citizen, his factual connection with the United States was greater than with Iran during the same period. *See Nasser Esphahanian v. The Islamic Republic of Iran,* Award No. 31-157-2 (1983) (citing, Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4).

Based on the evidence in the record, the Commission finds that the claimant's dominant and effective nationality was at all times that of the United States. *See, George Nourafchan v. The Islamic Republic of Iran,* Award No. ITL 75-415-3, p. 11 (1989); *Claim of MANUCHER LOUIS and JOYCE LOUIS*

Against the Islamic Republic of Iran, Claim No. IR-3172, Decision No. IR-0903 (1993).

II. Merits

A. Three-Story Building in Mirdamad/Davoodieh

The claimant has submitted evidence establishing that he owned a 2½ story building erected on 103 square meters of land in north Tehran. According to the copy of the deed submitted by the claimant, as well as claimant's own testimony, the property was mortgaged to Bank Meill for 5,680,000 Rials for a term of sixteen years from June 13, 1977. At the hearing, testimony was offered that the original principal amount of the mortgage was only 2,500,000 Rials of which 2,312,912 Rials remained unpaid in December 1980.

The Commission has reviewed the record as supplemented, including the affidavits and the testimony by the claimant, his witness and his appraiser. Based on the evidence, the Commission is persuaded that someone connected with the Foundation for the Oppressed took possession of the property in question as of December 22, 1980.

Accordingly, the Commission finds that the claimant's property was the subject of an uncompensated expropriation by the Iranian Government on or about December 22, 1980. Claimant is therefore entitled to an award to compensate him for the loss of his property located at Mirdamad from that date.

As regards valuation, the Commission has carefully reviewed all of the evidence and information submitted by the claimant. Taking into consideration the appraisals, claimant's own testimony, and the size and other characteristics of the

property, and having compared this property with similar properties for which values have been determined in other claims, the Commission Finds that claimant's equity interest in the Mirdamad property was $100,000.00 at the time of loss. Accordingly, the claimant is entitled to an award in that amount, dating from December 22, 1980.[1]

In accordance with precedents of the Iran-United States Claims Tribunal, recognized principles of international law, and its decisions in previous claims programs, the Commission further concludes that claimant is entitled to interest as part of his award, amounting to 10 percent simple interest per annum from December 22, 1980 to June 22, 1990, the effective date of the Settlement Agreement. Accordingly, claimant is also entitled herein to an award of interest of 94.9 percent of his principal award, or $94,900.00.

B. Condominium at Shahrake-Gharb

The evidence in the record indicates that, on or about November 1, 1976, the claimant signed a contract for the purchase of a condominium with the Omran Techlar Construction Co. Ltd. ("Omran"). The apartment, which had a purchase price of 8,764,000 Rials, was to be completed by September 30, 1978. According to the claimant, he paid a total of 3,856,160 Rials towards the purchase price; the remaining 4,907,840 Rials was payable over an eight-year period upon delivery of the apartment to the claimant. The claimant argues

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[1] The Commission also notes, however, that although the claimant has been found entitled to an award, he will not receive payment unless he submits an affidavit explaining why the original deed is no longer in his possession and that he waives any rights to such property. This document will be transmitted to the Government of Iran.

that, as a result of Iran's confiscation of his properties, the condominium was not transferred to him when it was ready. Therefore, he seeks the appraised value of the condominium as of December 1980, less any amounts that he owed thereon. He also seeks penalty payments for late delivery of the condominium for a three year period.

Although the Commission has determined, *supra,* that the Iranian Government through its physical occupation is liable for the confiscation of claimant's Mirdamad property, the claimant has not provided any documentary evidence that Iran took steps to confiscate any other property of the claimant prior to January 19, 1981. The Commission notes that, in his affidavit dated September 21, 1994, the claimant's witness stated that the apartment "was supposed to be handed over on September 29, 1978," but that it "was completed with 3 years' delay, *i.e.,* [sic] in the year 1981...". In a sheet of calculations handed to the Commissioners on the day of the hearing, the claimant has calculated the late payment penalty due him for a period of three years, presumably from September 1978 through September 1981. Based on this evidence, the Commission could assume that the claimant himself did not consider the apartment to have been ready until September 1981.

At the hearing, claimant's witness also testified that, sometime in 1992, he had visited Omran's offices to discuss the disposition of the apartment. According to his testimony, he was informed that Omran had received an order from the Revolutionary Government not to transfer the apartment and those of others to the owners when they were finished because "this apartment belongs to the Government." At this point, claimant's attorney elicited testimony that the witness was referring to the Foundation for the Oppressed. According to the

witness, Omran's representative stated that the order had been received in late 1980 and 1981. The witness also testified that he had alone to the revolutionary court to see a judge with whom he had prior dealings. He stated that he wanted to obtain a copy of the judgment confiscating claimant's properties but was told that he could not. The witness testified that he was told that claimant's properties were confiscated "because of his religion and his connection with the Ministry of Culture. " It was his testimony that the date of such judgment was after 1981 and 1982 but that the Prosecutor's order would have been earlier; that it took a period of two years for an order to mature into a judgment. At the hearing, claimant's witness also stated that according to his investigation, when the condominium was completed, "in 1981," the builder could not transfer title to the claimant because of a Government order confiscating claimant's properties. No other evidence was submitted in this regard.[2]

On the taking issue, claimant contends that the Iranian Government is liable for his loss by subjecting his interests to "other measures affecting, property rights" in the three-month period between his naturalization and January 19, 1981. Claimant argues that "proof of actual taking is not required," but rather that a claimant "need only establish that Iran has taken action that has unduly delayed his effective enjoyment of those properties, or deprived him of control of his properties for an extended period of time, or unreasonably interfered with the

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[2] In order to come within the jurisdictional cut-off date established by the Algiers Accords and relevant Tribunal precedents, the condominium would have been completed in the first nineteenth days of 1981. The claimant has not sought to argue that this was the case, and there is nothing in the record which would justify such a presumption.

use, enjoyment, or disposal of the properties for more than a reasonable period of time."

Claimant has also referred in his objection to three cases in which tile Tribunal has either defined or discussed "other measures affecting property rights."[3] However, in all three of these cases, the acts of interference discussed were actions taken by the Iranian Government and directed specifically against the particular claimants and their property. In *Eastinan Kodak,* the Tribunal held that the Iranian Government's interference with the claimant's subsidiary did not rise to the level of expropriation, but that there was specific interference which caused damage to the claimant and constituted other measures affecting property rights." In *Foremost,* the Tribunal found that the suspension of payment of profits and dividends to foreign shareholders, which was directed specifically against the claimant, was an interference with the claimant's rights which resulted in a deprivation and thus gave rise to a compensable claim. In *Tippetts,* the Tribunal, in discussing "other measures," stated that the effect of the measures against the owner is more important than the form of the measures, but that the deprivation caused by the interference had to be more than "merely ephemeral." That case too involved a specific action taken by Iranian government authorities against the claimant's business operations.

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[3] *Eastman Kodak Company, et al. v. The Government of Iran,* Award No. 329-2271/12384-3 (Partial Award, 1987), Award No. 514-227-3 (1989); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran,* Award No. 141-7-2 (1984); *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran,* Award No. 220-37/231-1 (1986).

In the present case, the claimant has argued that the actions and events he has cited constituted "other measures" which interfered with his use and enjoyment of his interests in the property. In addition, he asserts that the fact that he is a member of the Bahal community is prima facie evidence of his vulnerability to persecution.[4] However, other than his witness's testimony, the claimant has not pointed to any specific instance in which an Iranian Government official or agency took any measure against him which interfered with his use and enjoyment, or prevented him from disposing of the property prior to January 19, 1981, thus causing him damage.

In summary, therefore, although the Commission has carefully reviewed the claimant's arguments, statements and various other documents and materials submitted in support of his claim, it is not persuaded that, as of January 19, 1981, claimant had been deprived of his financial interest in the contract for the condominium in question by acts attributable to the Government of Iran.

Accordingly, the Commission determines that the claimant's claim for compensation based on the expropriation or other taking of his interest in the condominium by the Iranian Government before January 19, 1981, or as the result of

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[4] This statement is based on a copy of a release submitted by the claimant, issued in May 1988 by the Department of State, Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs, which stated the view that Bahais, as a religious minority in Iran, "have a prima facie case for a well-founded fear of persecution in Khomeini's Iran." The Commission notes, however, that this statement was directed to the Department of Justice and specifically focused on asylum cases and "a well-founded fear of persecution within the meaning of the Immigration and Nationality Act, as amended."

"other measures affecting, property rights" directed against him by that Government before January 19, 1981, must be and it is hereby denied.

The claimant alternatively argues that, in the event that the Commission does not find that his "properties" were expropriated or subjected to other measures, it must find that they were automatically quitclaimed and transferred to Iran under Article VII of the Settlement Agreement as a matter of law on June 22, 1990.

With regard to the condominium located in Shahrake-Gharb, the Commission notes that the claimant has not established that he was the owner of any "property" that could have been the subject of an Article VII transfer. As the record indicates, the claimant had entered into a private contract for the purchase of an apartment and had paid a portion of the purchase price as a down payment. The Government of Iran was not a party to this contract. At the hearing, testimony was elicited that Omran was a private company. In response to this testimony, claimant's attorney contended that "this was not a claim against Omran" but rather "the information that we have is that interference by the government caused the property not to be transferred" and that "the government had caused the loss."

The Commission has already determined that insufficient evidence exists for a finding, of expropriation or for a finding that "other measures" deprived the claimant of a property right in the condominium on or before January 19, 1981. The Commission also notes, however, that interference with contractual relations is a tort, and as such, falls outside the jurisdiction of the Commission as defined by Article II of the Algiers Accords.

The question for the Commission, therefore, is what kind of a property right, if any, the claimant had in his contract with Omran as of the date of the Settlement Agreement and whether that right was of the type that could be transferred under that Settlement Agreement. The claimant did not elaborate on this point either in his memorial or at the hearing. At the hearing, the claimant was advised by the Commission's staff attorney that the "Commission could look at the sales agreement as having been breached in 1978." Yet no response or elaboration was presented in opposition to this view.

In "Claimant's Memorial in Support of Objections to Proposed Decision," the claimant merely refers to "his properties" as having been transferred. No evidence or legal argument was presented as to claimant's ownership rights to the condominium as of the time of the 1990 transfer. What is clear from the evidence, however, is that, regardless of the reason, the claimant was not the owner of the property in question, i.e., he was not in possession of the deed to the property, as required under Iranian law, as of the effective date of the Settlement Agreement. Evidence was presented at the hearing that the condominium had eventually been sold, but no evidence was submitted that it was the Government of Iran who took title to the property and then sold it. In the absence of evidence to the contrary, the Commission must, therefore, assume that Omran, not having received full payment due at the time the apartment was completed, eventually sold the apartment to someone else. *See CLAIM OF MALEK MOEZZI Against the Government of the Islamic Republic of Iran,* Claim No. IR- 1600, Decision No. IR-2376 (1994). At most, therefore, the claimant had a legal action or claim for breach of contract or specific performance against a third party, namely, Omran.

In summary, therefore, to the extent that any right held by claimant may have been transferred under Article VII of the Settlement Agreement, the Commission finds it to have been strictly contractual in nature. Accordingly, claimant is entitled to an award only for the transfer to the Iranian Government of his right for the return of his down payment, together with the penalties due under the contract for delay in the builder's completion of the condominium.

Based on its review of the evidence and information submitted, the Commission finds that as of June 22, 1990, the value of those rights was 4,951,160 Rials, consisting of his down payment of 3,856,160 Rials plus 1,095,000 Rials in penalties. Accordingly, the Commission finds the claimant entitled to an award in the principal amount of $3,395.86 in this portion of the claim, dating from June 22, 1990.[5]

In adjudicating the claims covered by the Settlement Agreement, the Commission has awarded interest at the rate of 10 percent simple interest per annum from the date the claim arose until the effective date of the Settlement Agreement. This is consistent with its practice in previous claims programs. *See, Claim of LYLE L. TOWNSEND Against the Islamic Republic of Iran,* Claim No. IR-0918, Decision No. IR-0146 (1992) *(citing decisions previously issued in claims against Yugoslavia and Poland).* In the present case, however, the claimant's claim did not arise until the effective date of the Settlement Agreement. Accordingly, the claimant is not entitled to interest as part of the award in this portion of the claim.

---

[5] The Commission has determined that the free market exchange rate as of the date of the Settlement Agreement was 1458 rials to the dollar.

Appendix H

CONCLUSION

In summary, the Commission withdraws the denial of the claimant's claim set forth in the Proposed Decision, and enters the award set forth below, which will be certified to the Secretary of the Treasury for payment in accordance with subsection 501(b) of the Iran Claims Act. This constitutes the Commission's final determination in this claim.

AWARD

Claimant, MEHRDAD AZARMI, is entitled to an award in the principal amount of One Hundred Three Thousand Three Hundred Ninety-Five Dollars and Eighty-Six Cents ($103,395.86) plus interest on $100,000.00 from December 22, 1980 to June 22, 1990, in the amount of Ninety-Four Thousand Nine Hundred Dollars ($94,900.00), for a total award of One Hundred Ninety-Eight Thousand Two Hundred Ninety-Five Dollars and Eighty-Six Cents ($198,295.86).

Dated at Washington, DC and
entered as the Final
Decision of the Commission.

APPENDIX I

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of	}	
	}	
UNIVERSITY OF NORTHERN	}	
COLORADO	}	Claim No. IR-1651
	}	Decision No. IR-0053
	}	
Against the Government of the	}	
Islamic Republic of Iran	}	

PROPOSED DECISION

This claim in the amount of $766.00 against the Government of the Islamic Republic of Iran (hereinafter "Iran") is based on breach of contract arising out of the non-payment of tuition fees.

The record establishes that the claimant is and has been a United States national at all times relevant to this claim.

Under Title V of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (Pub.L. 99-93, approved August 16, 1985, 99 Stat. 437 (50 U.S.C. 1701 note); the "Iran Claims Act"), the Commission is authorized to

> receive and determine the validity and amounts of claims by nationals of the United States against Iran which are settled en bloc by the

> United States. In deciding such claims, the Commission shall apply, in the following order-
>
> (1) the terms of any settlement agreement;
>
> (2) the relevant provisions of the Declarations of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981 [the "Algiers Accords"], giving consideration to interpretations thereof by the Iran-United States Claims Tribunal; and
>
> (3) applicable principles of international law, justice, and equity.

The en bloc settlement referred to above was accomplished in an agreement between the United States and Iranian governments which became effective on June 22, 1990 *(Settlement Agreement in Claims of Less than $250,000, Case No. 86 and Case No. B38,* Award No. 483 (1990); the "Settlement Agreement"). The agreement encompasses

> any and all claims of less than $250,000 each, which have been filed with the [Iran-United States Claims] Tribunal by the United States on behalf of U.S. nationals, which claims are included in Cases Nos. 10001 through 12785, and which are still pending, whether or not recategorized as Official Claims . . . and whether or not the amount of any of such claims is ultimately adjudicated to be more than $250,000[,] [and] claims of U.S. nationals for less than $250,000 which have been submitted

> to the United States Department of State but were not timely filed with the Tribunal as well as claims of U.S. nationals for less than $250,000 which have been either withdrawn by the Claimants or dismissed by the Tribunal for lack of jurisdiction

Settlement Agreement, Art. I subsec. A.

Article III of the Settlement Agreement provides for referral of the claims to the Foreign Claims Settlement Commission for adjudication, and further provides that

> [i]n adjudicating . . . claims, the Commission shall apply Tribunal precedent concerning both jurisdiction and merits, and shall take into account all issues including counterclaims and liens.

Settlement Agreement, Art. III subsec. (v).

BASIS OF CLAIM

The claimant herein, UNIVERSITY OF NORTHERN COLORADO (hereinafter "the University"), asserts that the claim consists of a debt incurred. pursuant to two contracts between it and Iran to provide educational services to two students designated by Iran.

The record indicates that in March 1978, the University was presented with a letter of authorization dated December 16, 1975, from the University of Tehran identifying an Iranian student, Mr. Ali Reza Shirani-Chaharsughi as the recipient of a scholarship from the University of Tehran and stating that his

registration fees and the University tuition fees would be paid by the University of Tehran. Based on this letter, the University admitted the student to its educational program. Mr. Ali Reza Shirani-Chaharsughi enrolled at the University in Spring 1978 and was a student until Fall 1979 during which time he worked as a graduate student in Business Administration. During this period, the University sent its bills to the University of Tehran and they were regularly paid until early 1979. The record indicates that the University's tuition fees for Spring 1979 were not paid by Iran. The fees incurred on behalf of Mr. Shirani-Chaharsughi amounted to $766.00.

Similarly, in May 1978, a letter of authorization was received by the University from the University of Tehran which certified that a Mr. Mohammad Haghighi had been awarded a scholarship. The letter instructed the University to send the tuition bills incurred by him to the University of Tehran for payment. Based on this letter, starting in Fall 1978, the University sent its tuition bills to the University of Tehran for payment. The record indicates that the University's tuition fees for Spring 1979 and Winter 1979 were not paid by Iran. The fees incurred on behalf of Mr. Haghighi amounted to $1,534.00.

The record establishes that after the University informed of the debt, the University of Tehran sent a check for $1534.00. The University credited $768 against Mr. Haghighi's account and $766 against Mr. Shirani-Chaharsughi's account. The record further reflects that the University of Tehran and Mr. Haghighi intended that the entire amount should have been credited against Mr. Haghighi's account and that payment fulfilled all of its debts with the University. Through extensive correspondence with the University of Tehran, the University made several unsuccessful attempts to collect the debt. The

University claims that regardless of how it was to allocate the $1534, the University of Teheran still owes $766 in fees.

DISCUSSION

Based on the facts demonstrated above, the Commission concludes that the above-mentioned letters constituted an offer by the University of Tehran to purchase services, in the form of educational instruction for the two Iranian students. It is clear from the letters that Iran undertook to pay for the services provided to the designated students. These letters were issued to the University to enable the students to obtain educational services from the University without their having to pay for them. The University accepted this offer when it permitted the students to enroll in its educational program without having to pay the tuition themselves. Under the circumstances, the Commission holds that a valid contract for the purchase and sale of services was concluded. Such a holding is in accordance with the Tribunal decision in *Iowa State University of Science and Technology v. Ministry of Culture and Higher Education, and the Islamic Republic of Iran*, Award No. 276-B72-2 (1986). Thus, the Commission concludes that the claimant is entitled to an award in compensation for Iran's breach of contract.

Based upon the entire record, the Commission finds that the claimant is entitled to an award in the principal amount of $766.00, the amount of the unpaid tuition fees.

In accordance with Tribunal precedents and recognized principles of international law, the Commission further concludes that claimant is entitled to interest as part of its award, amounting to 10 percent simple interest per annum from February 14, 1979, the billing date of Mr. Haghighi's unpaid

Winter Quarter, to June 22, 1990, the effective date of the Settlement Agreement. Accordingly, claimant is also entitled herein to an award of interest of 113.5 percent of its principal award, or $869.41.

Therefore, the Commission makes the following award, which will be certified to the Department of the Treasury for payment in accordance with section 501(b) of the Iran Claims Act.

AWARD

Claimant, UNIVERSITY OF NORTHERN COLORADO, is entitled to an award in the principal amount of Seven Hundred Sixty-Six Dollars ($766.00), plus interest from February 14, 1979 to June 22, 1990, in the amount of Eight Hundred Sixty Nine Dollars and Forty One Cents ($869.41), for a total award of One Thousand Six Hundred Thirty-Five Dollars and, Forty One Cents ($1,635.41).

APPENDIX J

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of	}	
	}	
JALIL FARDANESH	}	Claim No. IR-1261
	}	Decision No. IR-1377
Against the Government of the	}	
Islamic Republic of Iran	}	

Counsel for Claimant: Lewis M. Johnson, Esquire
Westberg & Johnson

Oral hearing held on November 15, 1993.

FINAL DECISION

This claim in the amount of $249,000.00 against the Government of the Islamic Republic of Iran ("the Iranian Government") is based upon the alleged expropriation of the claimant's real property by the Government of Iran. The claimant has submitted evidence showing, that he owned two pieces of real property in Iran; the first of these was a lot in Karaj, some eighteen miles west of Tehran, and the second was a lot located in the Gheytarieh region of Tehran. The claimant has asserted that, as a result of the wrongful actions of the Iranian Government, or, alternately, by operation of law under the Settlement Agreement, he was deprived of this property.

Appendix J

By Proposed Decision entered July 23, 1993, the Commission denied the claim in its entirety. The Commission found that the claimant had not established that the Government of Iran had actually taken the property. In addition, the Commission rejected the claimant's argument that the terms of the Settlement Agreement automatically effected a transfer of his property to the Government of Iran.

The claimant, through counsel, objected to the Commission's Proposed Decision, submitted an extensive brief in support of his position, and requested an oral hearing at which to present his case. An oral hearing was held on November 15, 1993, at which attorneys for the claimant presented arguments and testimony in support of the objection. Essentially, the claimant raised three arguments: first, that the Commission erred in requiring proof of an actual taking, when proof of a constructive taking should have been sufficient; second, that the Commission erred when it determined that the Settlement Agreement did not automatically transfer the claimant's property to Iran; and, finally, that the evidence submitted is sufficient to establish that the claimant's property was, in fact, taken by the Iranian Government.

I. Actual and Constructive Expropriations

There is simply nothing in the record to support the claimant's allegations that his property was physically taken by the Iranian Government at the time of the Islamic Revolution. As stated in the Proposed Decision, the most recent documents submitted by the claimant appear to indicate that, years after the effective date of the Algiers Accords, the claimant was still the owner of record of the properties in question.

Claimant asserts, however, that proof of an actual taking "is not required by the applicable law and Hague Tribunal precedents." The claimant contends that he

> does not have to establish that his property was actually taken over by Iran. Rather, he need only establish that Iran has taken action that has unduly delayed his effective enjoyment of those properties, or derived him of control of his properties for an extended period of time, or unreasonably interfered with the use, enjoyment, or disposal of the properties for more than a reasonable period of time.

Memorial in Opposition to Proposed Decision, p. 6.

The claimant's statement of the law concerning expropriation is quite correct. Indeed, the Commission's Proposed Decision expressly acknowledged that "actions by the Government of Iran affecting property rights may properly be the subject of claims, and a compensable deprivation of property may, in fact, occur without an actual change in the title." The Commission did not reject the claimant's claim for failure to establish an actual formal change in ownership of the claimant's property; rather, the Commission was "not persuaded that the claimant's property was expropriated or otherwise taken outright by the Iranian Government, *or that the claimant has been deprived of the use and benefit of that property through some other action, wrongful or otherwise, on the part of the Government of Iran* (emphasis added).

The claimant has argued that various regulations restricting the transfer of property, together with Iran's "direct involvement in the many incitements against the United States and U.S. nationals," constituted an effective expropriation of the claimant's properties. While the Commission agrees that the law recognizes the concept of "effective expropriation," the Commission remains unpersuaded that such an expropriation took place at any time prior to January 19, 1981, the date of the Algiers Accords.

The Commission has recognized that regulations restricting the transfer of property were in force, and might constitute one factor in determining whether property had, in fact, been taken. *See, Claims of VICTOR J. JAMAL et al. Against the Islamic Republic of Iran*, Claim Nos. IR-0820, IR-0826, IR-1126, IR-1224, Decision No. IR-1485 (1993). However, neither the Iran-United States Claims Tribunal nor the Commission has ever held that regulations restricting the sale of property by persons outside Iran constituted, *ipso facto,* an effective expropriation of any property, and the Commission declines to adopt any such holding, at this time.

Claimant's argument that Iran's anti-Americanism constituted an effective taking of his property has already been raised at the Iran-United States Claims Tribunal. While the Tribunal, in several cases, has discussed the issue of state-endorsed anti-Americanism in Iran, it has never held that anti-Americanism itself gave rise to any general impairment of the property rights of American citizens. *See, e.g., Kenneth P. Yeager v. The Islamic Republic of Iran*, Award No. 324-10199-1 p. 23 (1987); *Jack Rankin v. The Islamic Republic of Iran*, Award No. 326-10913-2 pp. 17-18 (1987).

Moreover, even if, as a rule, anti-Americanism were to constitute wilful interference by the Iranian Government with the property rights of claimants, it is not clear that the rule would apply in the present case. In an affidavit dated May 5, 1993, the claimant stated that, in 1968, he advised the Iranian Ministries of Foreign Affairs and of the Interior that he wished to renounce his Iranian nationality. He was discouraged from doing so, however, for the reason that "the process was lengthy and very difficult," and that "anyone born an Iranian remains so for life." Accordingly, notwithstanding any anti-American policies enforced by the Iranian Government, it would appear that the Iranian Government considered the claimant an Iranian, rather than an American.

Finally, the Commission notes that, at the hearing, the claimant testified that part of his problem had been that money could not be transferred out of Iran. The Commission takes administrative notice of the fact that, even today, money can be transferred Out of Iran. The difficulty is one of extremely unfavorable exchange rates. If, in fact, this was claimant's concern, then the real issue is not actual or constructive expropriation, but rather losses sustained due to market conditions. However, both the Commission and the Tribunal have held that the Government of Iran cannot be held liable for unfavorable market conditions resulting from the Revolution. *Claim of ROBERT W. BARKER and BERNICE M. BARKER Against the Islamic Republic of Iran*, Claim No. IR-1213, Decision No. IR-1289 (1993); *see also, Howard, Needles, Tammen & Bergendoff v. The Islamic Republic of Iran*, Award No. 244-68-2 at p. 54 (1986). Thus, to the extent that the present claim arises from the impracticability of repatriating a satisfactory sum of money

after the sale of the claimant's property in Iran, the Commission has no choice but to deny it.

II. The Settlement Agreement

Claimant's second argument is that Article VII of the Settlement Agreement has deprived him of the use of his property, and has quitclaimed it to Iran. As reflected in recent decisions, the Commission has now adopted this view.

As discussed in those decisions, one of the stated purposes of the Settlement Agreement was to"'transfer to the Islamic Republic of Iran property of the Claimants as specified in Article VII." Article VII of the Settlement Agreement provides that

> [u]pon the issuance of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, all of the Claimants' tangible and intangible assets, rights, properties and real estate, of any kind, located in the Islamic Republic of Iran, asserted in the Claims of less than $250,000... shall be quitclaimed and transferred unconditionally, irrevocably and without any right to recourse, "as is and where is," to the Islamic Republic of Iran.

Article III(v) of the Settlement Agreement requires the Commission, in its adjudication of the Small Claims, to

> take into account, as appropriate, any transfers under Article VII of this Agreement, without

> in any manner entailing any liability for the Islamic Republic of Iran...

The use of the words "as appropriate" allows the Commission some discretion in determining whether or not an award is warranted under the terms of Article VII. In the present case, the record reflects that, from the time the claimant left Iran, the property remained in his name. The claimant has also shown that, subsequent to the Settlement Agreement, he was unable to access his property. Accordingly, the Commission finds that, by operation of the Settlement Agreement, the claimant's real property was transferred to the Government of Iran. The claimant is therefore entitled to an award for the value of this property as of June 22, 1990, the effective date of the Settlement Agreement.

Regarding the valuation of the properties, the Commission has considered the appraisals submitted by the claimant's expert, as well as the valuations determined in other cases involving real property situated close to that of the claimant. *See, e.g., Claim of NOURIEL ARYEH, et al. Against the Islamic Republic of Iran*, Claim Nos. IR-1184, IR-1185, IR-1189, IR-1240, Decision No. IR-2365 (1994). Based on the evidence in the record, the Commission finds that the value of the two properties together would have been in excess of $249,999.99, the Commission's jurisdictional limit. The claimant having reduced his claim to fall within that limit, the Commission finds that the claimant is entitled to an award in the principal amount of $249,000.00, the asserted amount of his claim. This award shall date from June 22, 1990, the effective date of the Settlement Agreement.

In adjudicating the claims covered by the Settlement Agreement, the Commission has awarded interest at the rate of 10 percent simple interest per annum from the date the claim arose until the effective date of the Settlement Agreement. This is consistent with its practice in previous claims programs. *See, Claim of LYLE L. TOWNSEND Against the Islamic Republic of Iran*, Claim No. IR-0918, Decision No. IR-0146 (1992) (*citing decisions previously issued in claims against Yugoslavia and Poland*). In the present case, however, the claimant's claim did not arise until the, effective date of the Settlement Agreement. Accordingly, the claimant is not entitled to interest as part of his award.

For the reasons stated above, the Commission withdraws the denial of the claimant's claim as set forth in the Proposed Decision, and instead makes the following award, which will be certified to the Department of the Treasury for payment in accordance with subsection 501(b) of the Iran Claims Act. This constitutes the Commission's final determination in this claim.

AWARD

Claimant, JALIL FARDANESH, is entitled to an award in the principal amount of Two Hundred Forty-Nine Thousand Dollars ($249,000.00).

Dated at Washington, DC
and entered as the Final
Decision of the Commission.

(2)

Supreme Court, U.S.
FILED
MAY 29 1998
OFFICE OF THE CLERK

No. 97-1440

In the Supreme Court of the United States

OCTOBER TERM, 1997

CLIFFORD F. GURNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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25 pp

QUESTION PRESENTED

Whether the espousal and settlement of claims asserted by United States nationals against the Government of Iran resulted in a "taking" of property requiring just compensation under the Fifth Amendment.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not yet reported. The opinion of the Court of Federal Claims (Pet. App. 18a-29a) is reported at 36 Fed. Cl. 482.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1997. The petition for a writ of certiorari was filed on March 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are United States nationals who assert that their property interests were damaged or im-

paired by the Government of Iran during the Islamic revolution. In 1990, petitioners' claims against Iran, along with similar claims of other United States nationals, were espoused by the United States and settled for a lump sum payment.[1] The United States, through the Foreign Claims Settlement Commission, then adjudicated each United States national's claim and made awards, which were paid on a pro rata basis out of the settlement proceeds. Petitioners maintain that those payments do not reflect the full value of their claims. They therefore contend that the United States' espousal of their claims was a "taking" of their property without just compensation, in violation of the Fifth Amendment. Pet. App. 1a-6a.

1. On November 4, 1979, the American Embassy in Tehran was seized and American personnel were taken hostage. In response, the President of the United States, among other actions, blocked the transfer or removal of all assets of the government of Iran subject to the jurisdiction of the United States. To resolve the ensuing diplomatic crisis, the United States and Iran entered into an international agreement that took the form of adherence to a series of declarations by the Democratic and Popular Republic of Algeria. This agreement, known as the Algiers Accords, generally provided for the release of hostages and return of Iranian assets. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 662-666 (1981).

---

[1] "A claim is espoused by the United States * * * when the government of the United States, usually through diplomatic channels, makes it the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the injury." Restatement (Second) of Foreign Relations Law of the United States § 211 cmt. b (1965).

The Accords also established procedures for resolving claims asserted by United States nationals who alleged that their property, contract rights, or other interests were impaired by Iran in the course of events surrounding the breach in relations between the two nations. The Accords provided that the two governments would terminate litigation brought by their nationals against the other government and instead seek to resolve such claims through binding arbitration. Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States, 20 I.L.M. 223, 224 (1981) (Iran-U.S. Commitments).

To further that goal, the Accords established at The Hague the Iran-United States Claims Tribunal, an international arbitral tribunal authorized to hear, among other matters, claims by the United States or United States nationals against the Government of Iran. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. II(1), 20 I.L.M. 230 (1981) (Iran-U.S. Settlement). The Tribunal was authorized to arbitrate any claim not settled within six months and to enter a final and binding arbitral award. *Id.*, arts. I, II(1), IV, 20 I.L.M. at 230-232.

The Accords gave the Tribunal jurisdiction over claims of United States nationals "aris[ing] out of debts, contracts, * * * expropriations or other measures affecting property rights." Iran-U.S. Settlement, art. II(1), 20 I.L.M. at 231. They also gave the Tribunal jurisdiction over certain government-to-government disputes arising out of contractual ar-

rangements for the purchase and sale of goods and services. *Id.*, art. II(2), 20 I.L.M. at 231. Claims of United States nationals of less than $250,000 were to be presented to the Tribunal by the United States government. *Id.*, art. III(3), 20 I.L.M. at 231. Larger claims were to be presented by the claimants themselves. *Ibid.* Finally, the Accords established a security account, initially funded with $1 billion of previously blocked Iranian assets, to ensure payment of Tribunal awards in favor of the United States and United States nationals. Iran-U.S. Commitments, Point I(7), 20 I.L.M. at 226.

2. The United States negotiated with Iran to resolve the small claims of United States nationals and certain other claims of the government of the United States.

a. In anticipation of a settlement of those claims, Congress passed legislation in 1985 giving the Foreign Claims Settlement Commission jurisdiction to adjudicate the individual small claims of United States nationals in the event that the United States and Iran reached an agreement settling all such claims for one lump sum. Foreign Relations Authorization Act, Pub. L. No. 99-93, Tit. V, § 501, 99 Stat. 437, 50 U.S.C. 1701 note. The Foreign Claims Settlement Commission is an independent agency established within the Executive Branch and now located within the Department of Justice. International Claims Settlement Act of 1949, 22 U.S.C. 1621 *et seq.* It has jurisdiction to "receive, examine, adjudicate, and render final decisions" with respect to certain individual claims of the United States and United States nationals against a foreign government where the United States has agreed to settle a set of such

claims en bloc, through the receipt of a lump sum payment. 22 U.S.C. 1623(a).

In deciding individual claims, the Commission is directed first to apply the provisions of the pertinent claims agreement and then to apply principles of international law, justice, and equity. 22 U.S.C. 1623(a). Members of the Commission are empowered to take evidence and to examine witnesses in the course of adjudicating each claim. The decision-making process, however, is not an adversarial one, and neither the foreign government nor any other party appears before the Commission to contest the claimant's position. 22 U.S.C. 1623(b)-(d) and (h). Claimants are entitled to notice of the Commission's decisions and to an administrative hearing if dissatisfied with the Commission's decision. 22 U.S.C. 1623(h). The Commission's final action allowing or denying a claim is conclusive and not subject to further administrative or judicial review. 22 U.S.C. 1623(h).

The 1985 Act gave the Commission authority to "receive and determine the validity and amounts of claims by nationals of the United States against Iran which are settled en bloc by the United States." Foreign Relations Authorization Act, Pub. L. No. 99-93, Tit. V, § 501(a), 99 Stat. 437. The Act directed the Commission to apply, in the following order, the terms of any settlement agreement, relevant provisions of the Algiers Accords, and applicable principles of international law, justice, and equity. *Ibid.* It also directed the Secretary of the Treasury to pay Commission awards in accordance with the provisions of 22 U.S.C. 1626 and 1627. Pub. L. No. 99-93, Tit. V, § 501(b), 99 Stat. 437-438.

Those statutory provisions specify that the proceeds of a lump sum settlement subject to the Com-

mission's jurisdiction are first deposited in a special, interest-bearing fund established in the Treasury. 22 U.S.C. 1627(a). The Secretary of the Treasury is authorized and directed to pay duly certified Commission awards out of that special fund. 22 U.S.C. 1627(e). The statute further establishes a set of priorities for the payment of Commission awards in the event that the proceeds of the lump sum settlement and any accrued interest are insufficient to make full payment. Those priorities essentially require the Secretary of the Treasury to make an initial payment of all or a portion of the principal of the award.[2] The initial payment is then followed by a pro rata payment of outstanding principal and interest based on the ratio between: (1) the total amount remaining in the pertinent Treasury fund and (2) the total amount of unpaid principal and interest. 22 U.S.C. 1627(e)(2) and (3).

b. On May 13, 1990, the United States and Iran agreed to settle for a lump sum payment of $105 million all claims of U.S. nationals of less than $250,000 as well as several claims of the Government of the United States for unpaid loans extended to Iran by the Unites States Agency for International Development. See Pet. App. 30a-40a. The settlement agreement provided that, in consideration of the lump sum payment, the United States would release Iran from all further liability on the claims subject to the agreement. *Id.* at 36a. It also provided that tangible

[2] The International Claims Settlement Act generally provides for the payment of up to the first $1000 of the principal of a Commission award. 22 U.S.C. 1627(c)(1). Those provisions were, in the case of claims against Iran, modified to permit payment of the first $10,000 of principal. Pub. L. No. 99-93, Tit. V, § 501(b)(1), 99 Stat. 437.

and intangible property underlying the subject claims and located in Iran would be "quitclaimed and transferred unconditionally" to the Iranian government. *Id.* at 37a.

The settlement agreement referred the individual small claims of United States nationals to the Foreign Claims Settlement Commission for adjudication. Pet. App. 34a. It did not, however, specify an allocation of the settlement proceeds between the United States' claims for repayment of its loans and the claims of United States nationals. It instead stated that distribution of the settlement "falls within the sole competence and responsibility of the Government of the United States." *Ibid.*

The Iran-United States Claims Tribunal ratified the settlement agreement on June 22, 1990, and the agreement became effective on that date. Shortly thereafter, the Department of State directed the Department of the Treasury to allocate $50 million of the settlement proceeds for payment of U.S. nationals, and transferred the small claims of U.S. nationals to the Foreign Claims Settlement Commission for individual adjudication. Pet. App. 23a.

c. The Commission completed adjudication of all small claims in February 1995. It granted awards on 1000 of the 3066 small claims adjudicated. Successful claimants were awarded a principal recovery based on the Commission's assessment of their economic injury, plus simple interest at approximately ten percent, running from the date of any Iranian governmental action found by the Commission to impair the claimant's property, through June 22, 1990, the effective date of the government-to-government settlement agreement. Pet. App. 24a.

The Commission entered awards with an aggregate value of approximately $42 million in principal and $45 million in interest. Pet. App. 24a. The total of all Commission awards exceeded the amount in the special Treasury fund established for payment of these claims.[3] The Secretary of the Treasury consequently made individual payments in accordance with 22 U.S.C. 1627(e)(2) and (3), which provided, in these circumstances, for full payment of the principal amount of every claim and a pro rata share—approximately 34.5%—of the interest awarded. Pet. App. 24a.

3. Petitioners are 22 individuals, private corporations, and educational institutions that received payments from the Treasury in satisfaction of claims against Iran. They filed suit against the United States in the Court of Federal Claims, alleging that the United States, in espousing and then settling their claims against Iran, had taken their property without paying constitutionally adequate compensation, in violation of the Just Compensation Clause of the Fifth Amendment. Pet. App. 24a.

The Court of Federal Claims granted summary judgment for the United States. Pet. App. 29a. Applying the three-factor takings analysis set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), the court held that the espousal of petitioners' claims did not amount to a compensable taking. First, the court explained that petitioners could have no reasonable, investment-

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[3] There was $57.8 million available for payment: the $50 million originally allocated from the lump sum settlement and an additional $7.8 in interest that had accrued on the special Treasury fund. U.S. Dep't of Justice, *Foreign Claims Settlement Commission of the United States Annual Report* 7 (1995).

backed expectation that claims arising out of international commerce would remain unimpaired by government actions intended to restore the mutual amity upon which such commerce depends. Pet. App. 26a.

Second, the court, in assessing the character of the government action in question, found that the espousal of petitioners' claims was not a simple appropriation of property, but rather an exercise of the President's long-established power to take up and settle the claims of United States nationals when it was deemed necessary to preserve or restore harmonious international relations. Pet. App. 26a-27a.

Third, the court concluded that the espousal of petitioners' claims had not harmed their economic interests, noting that "there is nothing in the record to suggest that [petitioners] would have fared as well, much less better, had they been forced to go it alone." Pet. App. 28a. It therefore held that the alleged shortfall in petitioners' recovery, as measured against the Foreign Claims Settlement Commission awards, did not rise to a Fifth Amendment "taking" of property.

4. The Federal Circuit affirmed. Pet. App. 1a-14a. The court of appeals reasoned that although in its view petitioners' claims do not fit neatly within the "regulatory takings" analysis, the *Penn Central* factors applied by the trial court remained relevant to evaluation of petitioners' takings claim. *Id.* at 8a. Applying those and other factors, the court concluded that the government's espousal of petitioners' claims and the settlement agreement did not effect a compensable taking.

First, the court noted that petitioners had derived a substantial benefit from the government's settlement of their claims. Quoting *National Board of Young Men's Christian Ass'ns* v. *United States*, 395 U.S. 85,

92 (1969), the court stated that where, as in this case, "the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public." Pet. App. 11a.

Second, the court reasoned that two Claims Court cases relied on by petitioners, *Meade* v. *United States*, 2 Ct. Cl. 224 (1866), aff'd, 76 U.S. (9 Wall.) 691 (1869), and *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), did not support petitioners' takings claim. The court noted that both cases involved instances in which the United States had extinguished individual claims against a foreign nation to further diplomatic objectives. The court explained, however, that neither case entered a monetary award for the plaintiffs or otherwise held that compensation was required by the Fifth Amendment. Pet. App. 11a-12a.

Finally, the court explained that petitioners' property interests in claims arising out of consensual international transactions were held subject to the government's established power to affect the assertion of claims against a foreign nation in order to maintain a degree of international amity. Pet. App. 13a. The court concluded that, in this case, the government had "provided an alternative tailored to the circumstances which produced a result as favorable to [petitioners] as could reasonably be expected." *Ibid.* It therefore held that petitioners had failed to establish that the government had effected a compensable taking of their property. *Id.* at 14a.

Judge Clevenger filed a concurring opinion. Pet. App. 14a-18a. In his view, "when one ventures into international commerce, it is with knowledge of the

extent to which that marketplace is regulated." *Id.* at 16a. Accordingly, a "taking by espousal is not automatically compensable, because no rational international commerce plaintiff could unblushingly assert shock or surprise that its property was seized by espousal." *Id.* at 17a. Although he noted that "there may be instances in which the governmental interests in espousal are so weak, or otherwise in question, that an espoused plaintiff may successfully show, in a rule of reason analysis, entitlement to compensation," he stated that petitioners had failed to make that showing in this case. *Ibid.*

ARGUMENT

Petitioners assert (Pet. 10) that the settlement of their claims violated the Fifth Amendment. Yet, despite a nearly 200-year history of the government's espousal of individual claims against foreign nations, petitioners are unable to cite a single case in which such governmental action has been held to be a "taking" requiring payment of just compensation. The court of appeals' decision correctly rejected petitioners' novel takings claim, and its decision is entirely consistent with this Court's precedent. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 12-15) that the court of appeals' decision is inconsistent with this Court's decisions in *Dames & Moore* v. *Regan*, *supra*, and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), which hold that, absent a congressional decision to withhold the remedy, the Tucker Act affords federal jurisdiction for claims that the United States has taken property without just compensation. Petitioners further argue (Pet. 15-18) that the decision below is inconsistent with *Monongahela Navi-*

gation Co. v. *United States*, 148 U.S. 312 (1893), which holds that where the government "takes" property, the judiciary decides whether the compensation afforded is constitutionally sufficient.

Petitioners' arguments are based on a misreading of the court of appeals' opinion. Nothing in the decision below purports to hold that petitioners cannot invoke Tucker Act jurisdiction. Nor does it suggest that, where a governmental action constitutes a compensable "taking" of property, the judiciary is bound to deem constitutionally sufficient any compensation afforded by the Legislative or Executive Branch. Rather, the court of appeals assumed jurisdiction over petitioners' Tucker Act action, evaluated petitioners' takings claim on the merits, and held that petitioners had not established that the government's espousal and settlement of their claims amounted to a "taking" implicating the Fifth Amendment requirement of "just compensation." Nothing in that holding is inconsistent with this Court's decisions regarding the availability of Tucker Act jurisdiction for a takings claim or the role of the judiciary in determining whether the government has paid constitutionally adequate compensation for a "taking" of property.

2. Petitioners assert (Pet. 18-21) that the court of appeals' decision, by focusing on the benefits afforded claimants by the settlement agreement, misinterpreted this Court's decision in *National Board of Young Men's Christian Ass'ns* v. *United States*, 395 U.S. 85, 92 (1969). *YMCA* arose from a suit against the United States for just compensation for losses sustained by the plaintiff when buildings it owned in the Panama Canal Zone were damaged by a mob of rioters and then occupied by United States troops for protection. This Court held that, "where * * * the

private party is the particular intended beneficiary of the governmental activity, fairness and justice do not require that losses which may result from that activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public." *Id.* at 92 (internal quotation marks omitted). The court of appeals in this case, citing *ibid.*, noted that the United States entered into the lump sum settlement here to further the interests of both the petitioner-claimants and the United States, that petitioners were among the specific intended beneficiaries of the agreement, and that petitioners had obtained recoveries that were as favorable to them as could reasonably be expected. Pet. App. 10a-11a, 13a.

Petitioners assert (Pet. 20-21) that *YMCA*'s holding should be limited to instances in which the government invades or occupies physical property to protect it or to further law enforcement objectives. In petitioners' view, any assessment of the economic benefits afforded a takings claimant in other circumstances would nullify the Fifth Amendment's "just compensation" requirement by denying recovery whenever "substantial" economic benefits are conferred in the course of the conduct alleged to be a "taking" of property.

Petitioners' contentions are mistaken. First, the principle animating *YMCA*—that actions intended to benefit the property owner do not generally constitute a taking—is not limited to the narrow circumstances in which the government furthers a law enforcement or protective purpose. Rather, a taking will rarely be found where the governmental action affecting property generally confers substantial, reciprocal benefits on the property owner. *Keystone*

Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470, 491 (1987); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Here, the benefits accruing to petitioners were direct, immediate, and substantial. In lieu of an inchoate and uncertain claim against a foreign sovereign, petitioners first were afforded a procedure, through the Tribunal, for maintaining their claims. They then were given a right to present their claims in a nonadversarial, administrative setting before the Commission in which no party challenged the merits of the claim or asserted defenses to liability, and under procedures designed to ensure that sufficient funds would be available to pay a substantial portion of any compensation awarded. As the trial court observed, "there is nothing in the record to suggest that [the petitioners] would have fared as well, much less better" had petitioners been required to pursue their claims against Iran in the courts of Iran or the United States, or later before the Tribunal. Pet. App. 28a. In recognizing that these direct benefits militated against finding a "taking," the court of appeals adhered to well-established law and did not depart from this Court's takings precedents.

Second, petitioners err in contending that a "taking" must be found whenever the benefits received from the governmental action do not equal or exceed the diminution in value of the affected property interest. That contention is predicated on the dubious assumption that the "value" of petitioners' claims is equal to the full face value of the alleged damages plus interest—without any discount for the possibility that petitioners might not have prevailed on the merits in a suit in the Tribunal or in a United States or foreign court against the government of Iran or

succeeded in obtaining full satisfaction of any resulting judgment in their favor.

Moreover, even assuming that their claims should not be so discounted, petitioners err in asserting (Pet. 20 n.27) that a taking occurred merely because "whatever 'benefit' petitioners received was less than what was taken from them." "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule [of reciprocity of advantage] in excess of the benefits received." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 n.21. Petitioners' assertion that any government action is a taking if it diminishes the value of property or fails to afford benefits of exactly equivalent value has no support in the case law. Cf. *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962).

Finally, contrary to petitioners' contentions (Pet. 20-21), this is not a case in which the government has paid only partial "compensation" for property otherwise taken. Cf. *Suitum* v. *Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1671 (1997) (Scalia, J., concurring in part and concurring in the judgment). It instead involves a governmental action that, while furthering important diplomatic objectives, also inherently benefitted petitioners and U.S. claimants generally by affording them a swifter and surer means of recovering on their claims, first in the basic settlement through the 1981 Accords, and then in the en bloc settlement of small claims within that framework. In considering those benefits, the court of appeals did not deviate from the constitutional standard of "just compensation;" it instead adhered to firmly established precedent holding that a "taking"

does not occur in the first instance where the governmental action provides direct and substantial benefits for the affected property owner.

3. Petitioners argue (Pet. 21-29) that the court of appeals' decision is inconsistent with *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). In that case, the Court held that governmental action that involves a physical invasion of property or denies all economically beneficial uses of land is a compensable taking "per se" (in the absence of a limitation inhering in the property that potentially subjected it to such governmental action), without further, case-specific inquiry into the impact on the claimant or the public interest underlying the challenged action. *Id.* at 1015. The principle of *Lucas* does not apply in this case, because the government did not occupy any physical property of petitioners, nor did it deprive them of all economically beneficial uses of their land.

a. This Court has never held that the impairment of a property interest in a legal claim or cause of action amounts to a per se taking requiring payment of just compensation. To the contrary, the Court has recognized a per se taking only where the governmental action extinguishes the right to either occupy or productively use real property. Government actions that are asserted to diminish the economic value of a claim or other property interests do not fall within those categories or otherwise amount to a taking per se. Compare *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) with *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. at 488-489 n. 18.

Petitioners could have had no reasonable expectation that their legal claims against a foreign sover-

eign would be held free of the government's powers of espousal and settlement. To the contrary, as the court of appeals recognized, "those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." Pet. App. 13a. International agreements settling claims by nationals of one state against the government of another are an established international practice and have been used repeatedly by the United States government since 1799. See *Dames & Moore*, 453 U.S. at 679-680 & n. 8; *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). The "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." *Dames & Moore*, 453 U.S. at 680, quoting Louis Henkin, *Foreign Affairs and the Constitution* 262-263 (1972).

Despite this long-established practice, petitioners fail to cite a single case in which the espousal and settlement of claims against a foreign nation have been held to be a "taking" requiring payment of just compensation. Petitioners assert (Pet. 25 n.29) that *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), stands for that proposition. Pet. 25 n.29. *Gray*, however, is a Court of Claims advisory opinion on a matter referred to it by Congress; it expressly reserved to the legislature the question of whether any compensation would be provided for the claims settlement at issue and

cannot be construed as a holding concerning the requirements of the Fifth Amendment. *Id.* at 345.[4]

b. Nor, even assuming that *Lucas* applies to inchoate property interests like petitioners' choses in action,[5] did the government deprive petitioners of all economically beneficial uses of their property. Indeed, as both lower courts found (Pet. App. 13a, 28a), petitioners failed to show that the government's espousal and settlement of their claims diminished the value of the claims in any respect. As an initial matter, the Algiers Accords in 1981 afforded petitioners substantial benefits by establishing the Iran-United States Claims Tribunal for the resolution of

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[4] *Gray* is also factually distinguishable as it involved a settlement that extinguished the claim entirely without, as in this case, providing the claimant with an alternative remedy and substantial compensation. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 59 n.6 (1989). Petitioners also rely (Pet. 27 n.30, 25 n.29) on Justice Chase's opinion in *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). Justice Chase's opinion in *Ware*, however, merely expresses the view that compensation ought to be afforded to individual debtors whose economic interests were adversely affected by a treaty. The case did not involve an instance in which the government settled or extinguished the claims of U.S. nationals against a foreign sovereign. It thus has no relevance here.

[5] Petitioners' claims reflect, at best, a property right in a *potential* recovery, not a right to interest on tangible, concrete property or funds. Accordingly, in assessing the economic impact of the government's action on petitioners' property, the Fifth Amendment inquiry must focus on the extent to which the settlement agreement affected the value of those intangible claims. Cf. *Pittsburg Steel Co.* v. *Baltimore Eq. Soc'y*, 226 U.S. 455, 459 (1913) ("The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact,—of what the remedy amounted to in practice.").

claims against Iran and a fund to secure its awards, thereby substituting a regular procedure for the prior situation of grave uncertainty for claimants in the wake of the hostage crisis. The Accords, however, provided for the United States, not the claimants themselves, to present claims for less than $250,000. See pp. 3-4, *supra*. The Accords themselves therefore subjected petitioners' claims to a significant measure of control by the United States. Petitioners do not challenge that basic feature of the Accords.

Even so, petitioners' prospects of prevailing in arbitration before the Tribunal were uncertain. Before the settlement agreement, the Tribunal had dismissed some claims as untimely and dismissed other claims for lack of jurisdiction. Pet. App. 22a n.7. The settlement agreement, in contrast, gave petitioners a remedy that was not subject to those defenses. Indeed, the agreement gave a remedy to claimants who, because they had withdrawn claims from the Tribunal's consideration or failed to meet the Tribunal's filing deadlines, could no longer pursue *any* claim before the Tribunal. *Ibid.*[6] It also secured sums to pay claims awards and, by referring petitioners to the nonadversarial processes of the Foreign Claims Settlement Commission, enhanced petitioners' likelihood of recovery.[7]

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[6] In some cases, the Commission issued claims awards in cases in which Iran had not in fact expropriated petitioners' property. Pet. 4 n.6.

[7] That some petitioners might conceivably have obtained greater recoveries if permitted to pursue arbitration of their claims before the Tribunal does not establish that the government's actions rise to a compensable "taking" of property. Cf. *Sperry*, 493 U.S. at 59 & n.6; *New York Cent. R.R.* v. *White*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1998

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243 U.S. 188, 202 (1917) (substitution of statutory workers compensation remedy for common law remedies does not deprive claimant of property without due process of law).

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No. 97-1440

In The
Supreme Court of the United States
October Term, 1997

CLIFFORD F. GURNEY, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 22, 1998

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QUESTION PRESENTED FOR REVIEW

Whether one who engages in international business has – as a matter of law – no reasonable investment-backed expectation that his property will not be taken by the United States without payment of just compensation?

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Pursuant to Rule 37.2[1] of the Rules of this Court, *amicus curiae* submits this brief in support of Petitioners.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defenders particularly recognizes that vigorous protection of private property rights in the international context is essential to the continued growth and economic well being of all Americans, for we are increasingly competing in a world marketplace.

STATEMENT OF THE CASE

Petitioners are United States citizens with claims against the Government of Iran for real and personal property confiscated or destroyed during the 1979 Iranian Revolution. An international agreement known as the Algiers

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[1] No counsel for either party authored this brief *amicus curiae*, either in whole in part. Furthermore, no person other than *amicus curiae* (their members or counsel) contributed financially to the preparation of this brief.

Declarations created the Iran-United States Claims Tribunal to sit in adjudication of these claims against Iran. Every award against Iran made by the Tribunal was paid in full, including interest, out of a fund supplied by Iran for this purpose.

In May 1990, before the Tribunal had a chance to finish hearing all remaining claims pending before it, the United States entered into a Settlement Agreement (Pet. App. 30a) which appropriated all remaining claims and related property valued under $250,000 of American citizens against Iran. Through this appropriation, known as "espousal," the federal government acquired title to petitioners' claims and other private property.[2] Petitioners neither had a choice in deciding whether their claims and property would be espoused nor did they participate in the settlement negotiations conducted by the United States.

The United States then conveyed these claims (including petitioners' claims) and other privately owned real

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[2] *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459 (1899)(discussing "espousal" as the formal taking up of a citizen's claim against a foreign sovereign and vesting title to the claim in the United States).

and personal property to Iran in exchange for a sum of $105 million from the Iranian government. The United States retained $55 million as settlement of its own claims, and the remaining $50 million was allocated for disbursement to the remaining claimants, including petitioners.

As a result of the federal government's taking of petitioners' claims (choses in action), and real and personal property, petitioners did not receive full or just compensation for the taking of their property; instead, they received only a fraction of the value of their property – an arbitrary amount determined solely by the United States. Pet. App. 91a.

Petitioners filed suit in the United States Court of Federal Claims (CFC) under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994), for the taking of their property without just compensation. The CFC held that the government was not obligated to pay just compensation to petitioners because: "Having considered the factors pertinent to our inquiry, the court is left with the certain conclusion that the events that befell plaintiffs were part of the risks they assumed in choosing to do business abroad." Pet. App. 29a. That decision was upheld by the United States Court of Appeals

for the Federal Circuit, which agreed stating, "[T]hose who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." Pet. App. 13a.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The United States Court of Federal Claims (CFC) and the United States Court of Appeals for the Federal Circuit – both courts of critical importance given their unique jurisdiction under the Tucker Act to hear all takings claims against the United States – have announced a rule of law in this case that is breathtaking in its implications for Americans engaged in international business[3]:

[3] In 1981, this Court examined the decision of the United States to take over the judgments and outstanding claims of American citizens against Iran and to set up a system of binding arbitration through an Iran-United States Claims Tribunal. *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Dames*, this Court upheld the President's authority to nullify and to take over outstanding private judgements and further explained that "to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an

> Plaintiffs cannot lay claim to an investment-backed expectation free of the potential of Government involvement. Those who engage in international commerce do so in full awareness that the security of their enterprise is uniquely dependent on the maintenance of stability and good order in the relationships of the nations involved. . . . Since the observance of good order among nations can never be taken for granted, the potential for Government involvement in international commerce remains an ever-present fact of life for those who transact their business abroad. . . . Plaintiffs are charged with knowledge of this reality.

Pet. App. 26a (citations omitted).[4]

It is indisputable that Americans who invest abroad cannot expect the United States to guarantee their investments against the instability of foreign governments. But the instant lawsuit is based on the uncompensated taking by the United States of petitioners' real property and claims against a foreign government. Hence, the instability of the

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appropriate action in the United States Court of Claims under the Tucker Act." *Id.* at 689-90.

[4] The decision below was based on plaintiffs' motion for partial summary judgment and defendant's cross-motion for summary judgment. Pet. App. 18-19a.

foreign government was not the cause of the taking of their property, but was merely the justification given by the federal government which took over petitioners' claims in order to settle its own claims against Iran.

Given the importance of international business dealings for Americans, the decision below has enormous implications. According to one study prepared by the U.S. Bureau of Economic Analysis (BEA), in 1996 Americans had invested abroad $970.8 billion valued at the current cost of tangible assets.[5]

Should the decision of the court below stand, this entire sum (or any portion of it) could be espoused, confiscated, or expropriated by the United States government

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[5] Russell B. Scholl, Bureau of Economic Analysis, *The International Investment Position of the United States in 1996*, 77 Survey of Current Business 24, 28 (July 1997). The figure is based on a stock measure of the total outstanding level of U.S. direct investment abroad (USDIA) at a given point in time, specifically 1996. According to Ray Mataloni of the International Division, Research Branch of the Bureau of Economic Analysis, the best measure to reflect the trend in the amount of U.S. money that is being invested abroad is the USDIA as measured in current costs. When measured by current cost, only tangible assets are revalued (factories, inventories, etc.) and price indices for the appropriate asset classes are used. Bureau of Economic Analysis, *A Guide to BEA*

without incurring any legal responsibility to pay just compensation for the assets taken. Nothing in the Constitution or in logic suggests that property located outside this country belonging to American citizens may be taken by the United States without just compensation any more than domestic property may be seized by the government without liability for compensation.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THIS ISSUE OF CRITICAL CONSTITUTIONAL IMPORTANCE CONCERNING WHETHER THE UNITED STATES MAY TAKE THE CLAIMS AND REAL PROPERTY OF AMERICANS WHO INVEST ABROAD WITHOUT INCURRING THE CONSTITUTIONAL OBLIGATION TO PAY JUST COMPENSATION INVESTMENTS ABROAD.

The rule of law announced in this case is a dangerous precedent in an era of the increasing importance of global business to the American economy *(e.g.,* NAFTA)[6]:

Statistics on U.S. Multinational Companies, 75 Survey of Current Business 38, 43 (March 1995).

[6] The current administration has repeatedly underscored the importance of global business for the American economy. "The North America Free Trade Agreement (NAFTA) has not only increased trade with our member partners . . . but also has provided greater stability to the global economy." Proclamation No. 7004, 62 Fed. Reg. 27, 927 (1997).

> Having considered the factors pertinent to our inquiry, the court is left with the certain conclusion that the events that befell plaintiffs were part of the risks they assumed in choosing to do business abroad. Accordingly, no principle of justice would support allocation to the public losses plaintiffs have claimed. In short, there was no taking of plaintiffs' property.

Pet. App. 29a.

Certainly, anyone who chooses to do business abroad takes risks and agrees to suffer the consequences of decisions made by foreign governments. Most petitioners in the instant case assumed that risk. Thus, if this case involved the Iranian government taking over petitioners' assets without payment, there would be no basis for this lawsuit since the United States would not be responsible for guaranteeing that risk.

However, such is not the case. Rather, this case concerns monetary claims owed by the Iranian government to petitioners and real property located in Iran that were expropriated by the United States, without payment of just compensation. Had the Iran-United States Claims Tribunal failed to pay petitioners full value for their claims arising out of the destruction of their assets during the 1979 revolution, again petitioners – having assumed the risk of investing abroad – would possibly have had no recourse against the

United States for that loss.[7] Here, however, the United States took title to (for its own benefit) petitioners' property – in order to settle its own claims – extinguishing petitioner's valid claim to full payment from Iran.

Thus, the holding in this case sets forth the extraordinary proposition that anyone who does business outside the borders of the United States runs the risk that the United States – as a means of negotiating an advantageous deal on behalf of the federal government – may squeeze out smaller private claims.

This Court has, on previous occasions, examined and rejected the government's argument that it is entitled to take some portion of private property – without incurring the Fifth Amendment's obligation to pay the owner for any of the property that is taken – in order to promote the general welfare: "The government in that case had not "merely 'adjust[ed] the benefits and burdens of economic life to promote the common good'. . . . Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, '[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

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[7] *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

should be borne by the public as a whole.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980)(quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1977); *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). *See also Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990)(holding that a government imposed poultry quarantine prohibiting interstate shipment of poultry stock constituted a compensable taking).

In the instant case, there is likewise no reasonable relationship between the government's taking of private claims, in order to provide leverage to settle its own claim, and the risk of doing business abroad. Indeed, the broad reach of the holding in this case suggests that anyone who invests assets abroad[8] has - as a matter of law - no reasonable expectations that the federal government may not one day take over his property and without payment of just compensation as the Fifth Amendment to the Constitution requires. Pet. App. 13a – 14a. Given the magnitude of

[8] It is not just Iran-United States Claims Tribunal claims or even just choses of action that the holding below reaches. All amounts owed to Americans by foreign governments or foreign nationals – *e.g.*, stock traded on foreign exchanges, real property owned abroad including sales and manufacturing facilities, letters of credit from or deposits in foreign banks, payments owed for goods delivered overseas, proceeds of construction contracts, or monies loaned by United States banks to foreign nationals - all could apparently be taken over by the United States and used to reach an international agreement without any obligation to pay the owner just compensation.

private investment abroad, this is an extraordinary legal principle for the U.S. Court of Appeals for the Federal Circuit to adopt.[9] According to the one report from the United States Bureau of Economic Analysis, in 1995 Americans increased their direct investment abroad (USDIA) by $100.8 billion to $880.1 billion.[10] The USDIA increased again in 1996 to reach $970.8 billion.[11]

Contrary to the court below, which held that the President has the "indisputable power to take up and to settle the claims of American citizens against foreign states and nationals" Pet. App. 26a. (citing *United States v. Pink*, 315 U.S. 203, 240 (1942)), there is nothing in this Court's decisions that allows this result. In *United States v. Pink*, 315 U.S. 203, 240 (1942), relied on by the court below, this Court did not even reach the issue herein presented for review, *to wit*, whether this power can be exercised without

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[9] The significance of this decision is underscored by the fact that the U.S. Court of Federal Claims has unique jurisdiction to hear all claims for just compensation against the United States. 28 U.S.C. § 1491 (a)(1) (1998). Hence, this ruling will bind all future decisions on this issue.

[10] Russell B. Scholl, Bureau of Economic Analysis, *The International Investment Position of the United States in 1995*, 76 Survey of Current Business 36 (July 1996).

[11] Russell B. Scholl, Bureau of Economic Analysis, *The International Investment Position of the United States in 1996*, 77 Survey of Current Business 24, 28 (July 1997). The Organization for Economic Cooperation and Development (OECD) reports that, for the years between 1985 and 1995, the United States direct investment abroad increased from $12.72 billion to $96.897 billion. These figures represent

incurring the obligation to pay for any private property taken. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (taking of private property by the government requires the payment of the "full and perfect equivalent for the property taken.").

Not only is the holding of the court below a dangerous precedent in the context of our world economy, which looks to private property rights as the basis of secure international dealings,[12] but the premise that the court can define away as a matter of law the reasonable, investment-backed *expectations* of an entire class of owners of clearly defined property interests could swallow the Just Compensation Clause.

CONCLUSION

Accordingly, because of the breadth of the constitutional holding in this case and because of the

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.32% and 1.39% of GDP respectively. OECD, *Investment* (visited May 18, 1998) <http://www.oecd.org/publications/figures/invest.html>.

[12] International law emphasizes the protection of private property rights in order in part to afford security in the arena of international trade: "In fact, the protection of private property from state interference has been one of the most pronounced themes throughout the history of modern international law since its inception in the seventeenth century. One could even argue . . . that modern international law developed for the express purpose of protecting private property rights from state interference." L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 Am. U.J. Int'l L. & Pol'y 263, 264 (1997).

significance of the decision given the magnitude of U.S. investments abroad, *amicus curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CLIFFORD F. GURNEY, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Federal Circuit

PETITIONERS' REPLY BRIEF

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Dated: June 5, 1998

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PETITIONERS' REPLY BRIEF

A serious error of fact concerning the nature of the property affected by the Settlement Agreement forms the lynchpin of the United States' opposition to the grant of *certiorari*. The government urges that its appropriation of petitioners' property was a "regulatory" action, a view unequivocally rejected by the court of appeals and surely incorrect. Specifically, the government contends that only real property may be taken *per se* and that, therefore, because petitioners did not possess real property, partial compensation for the appropriation of that property is permissible. The government is wrong on both counts. This Court has never held that personal property may be appropriated for public use without just compensation. Further, it is undisputed that real, as well as intangible, property was taken here. Because these errors interleave the entire opposition, petitioners submit this reply.

1. The government asserts that it took from petitioners only "an inchoate and uncertain claim against a foreign sovereign." Opp. Br. 14. It is a matter of established fact that some petitioners had real property, fee simple absolute, directly transferred by the Agreement to Iran. Pet. App. 84a-90a; Pet. App. 63a. Others had personalty other than choses in action. *See, e.g.*, Pet. App. 76a. For this reason, the espousal and transfer worked by the Settlement Agreement was not limited to "claims" or *choses in action*. Real property (and other tangible property) owned by U.S. nationals on the effective date of the Agreement was expropriated by the United States and transferred to Iran in addition to claims. This is perfectly illustrated by the example of petitioner Fardanesh who, prior to the settlement agreement, owned two parcels of land in Iran. Alleging that Revolutionary Guards had occupied the property, he filed a claim at the Tribunal for damages.

After the settlement agreement, the Commission determined that Mr. Fardanesh's property had, in fact, not been appropriated by Iran. This did not mean, however, that he still owned the property. He did not because the United States had conveyed it to Iran pursuant to Article VII of the Settlement Agreement. Title changed hands by means of the Settlement Agreement.

The government not only misstates the facts regarding the property interests taken, but ignores that espousal is appropriation, not regulation.[1] That an espousal is a taking *per se* cannot be doubted, regardless of the type of property interest at issue. In *Mugler v. Kansas*, the Court noted the difference between a regulatory act and an appropriative act:

> The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

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[1]*See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 459 (1899).

123 U.S. 623, 668 (1887).

This distinction has been applied many times since *Mugler*, notably in two cases upon which the government relies here: *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 (1987), and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). The government also cites *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), in which the same distinction was drawn: "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather a significant restriction has been imposed on one means of disposing of the artifacts . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." For this reason, a regulatory analysis was appropriate.[2]

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court held that a Presidential program of forum-shifting of claims[3] (short of espousal) could result in a taking. The availability of the Tucker Act remedy where plaintiffs could be made whole if the Presidential program failed to provide just compensation constituted an adequate remedy at law, according to this Court, thereby defeating Dames & Moore's request in equity to enjoin the provisions of the Algiers Accords. But in

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[2]The result in *Allard* was **not** dictated by the fact that the Court had not previously held that regulation of the sale of eagle feathers could constitute a taking. Similarly, the government's incantation that the Court has never held that the extinguishment of international claims gives rise to a Fifth Amendment obligation is no substitute for reasoned analysis. The Court long ago determined that choses-in-action are property protected by the Fifth Amendment, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796), and not long ago at all determined that even the diminution of such property would be cognizable under the Tucker Act. *Dames & Moore*.

[3]The Court did not discuss real property.

Dames & Moore there had been no taking at the time this Court heard the case. First, the Accords did not extinguish claims or transfer property. Secondly, the compensation proceeding had not been conducted, so there was no way to tell if the ultimate compensation was just or not.

Both elements missing in *Dames & Moore* are present here. First, the extinguishment and transfer provisions of the Settlement Agreement bear only one meaning -- what was petitioners' became the property of the United States which then transferred it to Iran. This is a classic appropriation. Second, there has been a valuation procedure by the Foreign Claims Settlement Commission, which if not perfect, is by statute final. 22 U.S.C. § 1623(h). This damage award cannot be challenged by petitioners or the United States. *See DeVegvar v. Gillilland*, 228 F.2d 640 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 994 (1956). And petitioners received payments *in every case* less than the damage award plus interest to the date of payment. The Commission was not free to award the full amount due petitioners, however, but was restricted to parceling out a *pro rata* share of the amount allocated to it by the government from an amount set by the executive, not the judicial, department. The executive, though a trustee for the claimants, paid them what was left over after the government took what it wanted to satisfy its own claims.

In this case, as the facts show and as the court of appeals held, petitioners were completely deprived of their property. The government took it in an act of eminent domain, and traded it to Iran.[4]

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[4]The decisions below assure there can never be a taking of property in the context of an espousal/transfer no matter what value the President, acting alone, puts on the claims. Petitioners are at a loss to understand how, (continued...)

2. As its sole basis for the use of regulatory takings analysis, the government suggests that the Court's distinction between "regulatory" and "per se" takings is limited to real property. Opp. Br. 16. This is wrong -- the Court has applied a "per se" analysis to the taking of personalty: *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980). And the Fifth Amendment certainly protects even intangibles or other personal property. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 & n.9 (1984); *Armstrong v. United States*, 364 U.S. 40 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (finding taking of right to collect tolls prior to development of regulatory taking doctrine); *Hollister v. Benedict & Burnham Manuf. Co.*, 113 U.S. 59 (1885); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852) (suggesting, in dicta, that appropriation of supplies for military use would have required just compensation, had it been authorized). Further, the Court has never suggested that the Fifth Amendment somehow provides lesser protection for personal property from appropriation for public use. In *Lucas v. South Carolina Coastal Council*, the Court observed that owners of personalty ought to expect the possibility of *regulation*, because of the State's "traditionally high degree of control over commercial dealings." 505 U.S. 1003, 1027 (1992). The Court cited *Allard*, 505 U.S. at 1028, which in turn relied upon *Everard's Breweries v. Day*, 265 U.S. 545 (1924), and *Jacob Ruppert, Inc. v Caffey*, 251 U.S. 264

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[4](...continued)
as the government indicates, the Court's holding in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), is not implicated by this conclusion. Every case is susceptible to the "analysis" of the court of appeals that petitioners are merely dissatisfied with the Settlement "negotiated by the government" and thus that there is no "compensable taking." Petitioners are indeed dissatisfied with any compensation other than just compensation for their property.

(1920). In these cases, the Court carefully distinguished between the permissible -- regulation of certain uses of personal property -- and the implicitly impermissible -- appropriation of the affected property. *See Allard*, 444 U.S. at 66-67; *Jacob Ruppert*, 251 U.S. at 303.

At bottom, the assertion that personalty is more susceptible to regulation is really another aspect of the "antecedent inquiry" requirement articulated later in *Lucas*, 505 U.S. at 1029-30, but misapplied below. Pet. 21-29. In any takings claim, it is of course necessary to ascertain what interest has been "taken" by the government and that the interest was in fact possessed by the claimant.[5] Real property (including that owned by some petitioners) includes a well settled right to exclude so that physical occupation can easily be seen to be a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). But the Court's rationale for concluding that appropriation of even a small part of real estate is a taking of land applies to personalty as well. In *Loretto*, the Court explained that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property, it destroys each of these rights." 458 U.S. at 435 (citation omitted). This same logic very obviously applies when the government takes possession of any item of personalty. Or even an intangible.

Petitioners agree that some scrutiny of the nature of their property interests is appropriate. However, the *Lucas* antecedent inquiry must be properly conducted. To obtain summary judgment, it was not enough for the government to argue that simply because some petitioners had property other

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[5]*See, e.g., Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (private property held subject to government's navigational servitude).

than land, the government is therefore free to appropriate all property without payment of just compensation, paying only an amount set by the President, not a court. The government must show that under the law that controls the very existence of the property, it has some "easement" that allows it to completely appropriate the property without just compensation. This it has not done and cannot do.

* * *

In addition to the serious errors noted above, the government's brief contains two misstatements of the record that cannot pass unremarked: (a) that petitioners are seeking to overturn this Court's regulatory taking jurisprudence; and (b) that the Settlement Agreement was intended to benefit petitioners.

3. Petitioners do not argue that "any government action is a taking if it diminishes the value of property or fails to afford benefits of exactly equivalent value." Opp. Br. 15. The taking analysis turns on the governmental action--here an outright appropriation and transfer. Nor do petitioners contend that the government must pay compensation whenever regulatory action diminishes the value of property, or every time the government otherwise imposes some cost on a citizen. There is thus nothing in petitioners' argument that is inconsistent with the holdings of *Keystone*, *Allard*, *Goldblatt*, or *United States v. Sperry Corp.*, 493 U.S. 52 (1989). Petitioners' argument -- and the government should have been able to understand this -- is that when the government takes *possession* of a citizen's property to put it to public use, the Constitution requires payment of just compensation. Just compensation is fair market value at the time of the taking plus interest from the date of the taking to the date of payment. It is, moreover, petitioners' position that partial compensation --

either in the form of partial payment, the conferring of some benefit worth less than the property appropriated, or some combination of the two -- does not satisfy this constitutional mandate.

4. The government asserts -- without any citation to the factual record -- that the government entered into the settlement agreement with the intent of benefitting petitioners. Opp. Br. 15. There is simply **no** evidence concerning the government's intent in the record -- indeed, in the trial court, the government suggested that the court was not permitted to examine its motives in entering into the settlement. But the consequences for petitioners of the Settlement Agreement belie any such benign motive. The procedures before the FCSC were neither significantly "swifter and surer"[6] than those of the Iran-United States Claims Tribunal which they replaced. Large claimants (like the small claimants prior to the Settlement Agreement) to this day receive awards with full interest to the date of payment by the settlement bank in Amsterdam, thereby obviating any perceived significance of delay. And the "batting average" at the FCSC for small claims was drastically worse than at the Tribunal. Only a third of claimants at the FCSC received any money at all, while at the Tribunal over 85%of small claims concluded received awards. Pet. App. 47a.

Thus, the transfer of petitioners' claims to the FCSC, where they got smaller awards and prevailed less frequently, cannot fairly be regarded as a "benefit" to them as the courts below seemed to believe. The government does not even try to argue that petitioners who lost real property as the result of the settlement were benefitted by it. In any event, such a benefit ought to be relevant only in the damages phase of a Tucker Act

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[6] Opposition at 14.

proceeding, not to a decision holding that the petitioners had no "compensable interest" in their lands, bank accounts and choses-in-action.

The FCSC was directed to apply Tribunal precedent to the small claims, must be presumed to have done so, and its decisions cannot now be challenged by the government or petitioners. Thus, the government's suggestion that it is a "dubious assumption" that petitioners would have prevailed at the Tribunal is both factually erroneous and legally impermissible. For all practical purposes at this stage, the FCSC sat as the Tribunal and its decisions rest on the same footing.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for writ of *certiorari* should be granted.

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